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No.

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

YOSH SAKAMOTO, PACIFIC GIFT SUPPLY
and TOP ENTERPRISES, INC.,
Petitioners,

v.

DUTY FREE SHOPPERS, LTD., GUAM AIRPORT
AUTHORITY and THE GOVERNMENT OF GUAM,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners Yosh Sakamoto, Pacific Gift Supply Inc., and Top Enterprises, Inc., respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 1, 1985.

QUESTIONS PRESENTED

1. Is the Government of Guam bound by the same limitations that prevent states and their political subdivisions from burdening interstate and foreign commerce?
2. Are the Government of Guam and its sub-agencies immune from federal antitrust laws because of their status as federal instrumentalities?

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II. The grant of antitrust immunity to the government of Guam is a judicial incursion on the exclusive right of Congress to make rules and regulations for the territories and is in conflict with the law in the District of Columbia Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, is reported at 764 F.2d 1285 (9th Cir. 1985) and appears in the appendix hereto. The Opinion of the District Court of Guam is not reported and appears in the appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on July 1, 1985. No Petition for Rehearing or Rehearing En Banc was requested and this Petition for Certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Article I, Section 8, Clause 3 — The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Constitution of the United States

Article IV, Section 3, Clause 2 — The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

United States Code, Title 48

§ 1422. *Governor and Lieutenant Governor*

The executive power of Guam shall be vested in an executive officer whose title shall be the "Governor of Guam". The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam.

United States Code, Title 48

§ 1423a. *Power of Legislature*

The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam.

United States Code, Title 48

§ 1423i. *Approval of bills*

. . . All law enacted by the legislature shall be reported by the Governor to the head of the department or agency designated by the President under Section 1421a of this title. The Congress of the United States reserves the power and authority to annul the same.

STATEMENT OF THE CASE

Guam has is recent years become a resort area for Japanese tourists. Petitioners and Respondent Duty Free Shoppers, Ltd. are competitors in the business of selling gift items to these Japanese tourists to take with them back to Japan for friends and relatives. Petitioners claim that the Japanese tourist market is a unique and separate market; that the Japanese expect and demand that their gift purchases be delivered to them at the airport so that they will not be inconvenienced during their vacation.

Respondent Duty Free Shoppers, Ltd., the Government of Guam and Guam Airport Authority are parties to a contract that gives Duty Free Shoppers, Ltd. the exclusive concession for gift items at the Guam airport. A restrictive covenant in the agreement provides that the Guam Airport Authority may not, and will not, allow anyone to deliver gift items to departing passengers at the airport. The Guam Airport Authority has promulgated and enforced rules and regulations to implement this exclusion and has forbidden and prevented the petitioners from delivering gift items to departing passengers at the Guam International Airport.

Petitioners filed an action in the District Court of Guam alleging that the agreement by the Guam Airport Authority and Duty Free Shoppers, Ltd. violated the Sherman and Clayton Acts and that the prevention of deliveries to departing passengers at the airport violated the commerce clause. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1337 and 1343, and 15 U.S.C. §§ 15 and 26.

The District Court issued summary judgment in favor of defendants dismissing the action, on various grounds. The Ninth Circuit affirmed, based on the conclusion that the Government of Guam is not bound by the negative implications of the commerce clause, and is immune from liability under the antitrust laws because it is an instrumentality of the federal government.

REASONS FOR GRANTING THE WRIT

I

ALLOWING GUAM TO BURDEN INTERSTATE AND FOREIGN COMMERCE CONFLICTS WITH THE INTENTION OF CONGRESS, AND THE CASE LAW OF THE SUPREME COURT AND THIRD CIRCUIT COURT OF APPEALS.

This case marks the first time in history that a popularly elected American local government has been given a power explicitly reserved to the Congress of the United States. This decision give unqualified permission to the Government of Guam and its agencies to ignore all Supreme Court decisions that have restricted state governments and their agencies from burdening interstate and foreign commerce. Not only does this trammel upon the exclusive right of Congress to regulate commerce, but it also interferes with the exclusive right of Congress to regulate the territories by announcing, in direct contradiction of the specific congressional grant of local autonomy, 48 U.S.C. §§ 1422, 1423, that the popularly elected Government of Guam is nothing more than a federal robot, a mere government-owned railroad.

The Court agrees that an incorporated territory may not burden interstate commerce, but because Guam is an unincorporated territory and under the plenary control of Congress, as evidenced by Congress's power to annul Guam legislation, it is not bound by the same limitations that bind incorporated territory governments. Guam may therefore ignore the commerce clause and all Supreme Court decisions delineating its reach.

This analysis is faulty and led the Court to an incorrect conclusion. The language of the Constitution makes no distinction between incorporated and unincorporated territories. Rather, it plainly states that Congress has the power to make all necessary rules for regulating the territories. U.S. Constitution Art. IV, Sect. 3, Cl. 2. Thus Congress has plenary power over all territories, incorporated or unincorporated.

Supreme Court case law makes unequivocally clear that incorporated territories are not unique in having their legislation subject to annulment by Congress. All territories are subject to this Congressional prerogative. In *First National Bank of Brunswick v. Yankton*, 101 U.S. 129, 25 L.Ed. 1046 (1880), in finding that Congress had expressly validated the issuance of bonds to a railroad, although Congress had annulled legislation of the Dakota Legislative Assembly in the process, the Court explained that:

> "In the Organic Act of Dakota there was no express reservation of power in Congress to annul the acts of the territorial legislature, but none was necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial government. It may do for the territories what the people of the United States may do for the states.

First National Bank of Brunswick v. Yankton, 101 U.S. at 133.

Similarly, the Utah Territorial Legislature was subject to the same restrictions:

> "That the legislative powers of said territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of the act . . . All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States and if disapproved shall be null and of no effect."

Late Corporation of Latter Day Saints v. U.S., 136 U.S. 1, 10 S.Ct. 792, 803, 34 L.Ed. 478 (1890). See also *Murphy v. Ramsey*, 114 U.S. 15, 5 S.Ct. 747 (1885).

An examination of the statutes of Alaska and Guam show that the Congressional grant of legislative power to these two territories was almost identical.

> The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam . . . 48 U.S.C. § 1423(a) (Supp. 1985).
>
> The legislative power of the territory of Alaska shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States . . . 48 U.S.C. § 77 (1952).

Moreover, Congress had the power to annul legislation enacted by the territory of Alaska:

> All laws passed by the legislature of the territory of Alaska shall be submitted to Congress by the president of the United States, and if disapproved by Congress they shall be null and of no effect.

48 U.S.C. § 90.

The substance of the power Congress exercised over the territory of Alaska is the same with regard to Guam:

> All laws enacted by the legislature shall be reported by the governor to the head of the department or agency designated by the president under Sect. 3 of this Act. The Congress of the United States reserves the power and authority to annul the same.

48 U.S.C. § 1423i.

Because all territories generally, and the territory of Alaska specifically have been held subject to Congressional annulment of legislation, the attempt to distinguish Guam from the former territory of Alaska fails. The Ninth Circuit is in direct conflict with the Supreme Court's affirmance of its decision in *Andersen v. Mullaney,* 191 F.2d 123 (9th Cir. 1951) aff'd, 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952). This departure from clear and established precedent was noted by Judge Hug in his concurring opinion.

> ". . . I am not fully convinced that the commerce clause does not apply to the territory of Guam under the authority of Andersen v. Mullaney, 191 F.2d 123 (9th

Cir. 1951), aff'd 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952). I find the distinction between the Territory of Alaska and the Territory of Guam somewhat tenuous."

Moreover, the attempted distinction fails not only because of the error in finding the annulment power of Congress unique to unincorporated territories, but also because of the complete inapplicability of the doctrine of territorial incorporation to this issue.

As a legal concept, territorial incorporation developed from the debate over which Constitutional protections applied to the inhabitants of the territories acquired by the United States as a result of the war with Spain. In other words, which provisions of the Constitution restricted Congress' broad powers over the territories under the territorial clause of the Constitution?

Debated questions included whether Congress is bound by the uniformity clause in laying duties on imports from Puerto Rico; whether guarantees of grand jury indictment and trial by jury were applicable in the Philippines, Hawaii and Puerto Rico; and whether the due process clause is applicable in Puerto Rico. *See Torres v. Commonwealth of Puerto Rico,* 442 U.S. 465, 99 S.Ct. 2425, 2428 (1979); *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero,* 96 S.Ct. 2264 (1978) and cases cited therein. *See also Coudert, The Evolution of the Doctrine of Territorial Incorporation,* 26 Col. L.Rev. 823 (1926).

Unlike the due process clause of the fifth and sixth amendment guarantees that impose restrictions on Congress' power, the commerce clause grants a power to Congress. Thus the doctrine of territorial incorporation is inapplicable. Although reasonable men may argue that the fifth amendment's guarantee of individual rights or liberties should or should not operate as a restriction on Congress in its otherwise absolute power over administrating the territories, Congress cannot be limited by its own plenary power under the commerce clause.

The Ninth Circuit recognized this principle in *Andersen v. Mullaney,* supra. In *Andersen,* the Court held that the Territorial Government of Alaska was bound by the same proscription on burdening commerce that bound the states. The reason for this was not because the commerce clause operated *Ex Proprio Vigore* as a constitutional limitation, because as far as the Constitution was concerned Congress could allow Alaska to burden commerce under its territorial clause powers, article IV, section 3, clause 2. Rather, the Court stated that "we cannot conceive that in granting the legislative power to the territorial legislature it was intended that the power should exceed that possessed by the legislature of a state in dealing with commerce." Id. at 128.

The Supreme Court, in affirming this case, stated regarding Congressional intent:

> "In the light of these sections we cannot presume that Congress authorized the territorial legislature to treat citizens of states the way states cannot treat citizens of sister states. Only the clearest expression of congressional intent could induce such a result. It is not present."

342 U.S. at 420, 72 S.Ct. at 431, 96 L.Ed. at 463.

Clear congressional intent was the key to solving the problems in *Andersen* and it has been used repeatedly to answer analogous questions. Thus, in finding no congressional intent to allow Guam its own supreme court, this Court stated in *Territory of Guam v. Olsen,* 431 U.S. 195, 202, 97 S.Ct. 1774, 1778, 52 L.Ed.2d 250, 256 (1977):

> "First, we should be reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate Review by Article III courts, including this Court, of decisions of territorial courts in cases that may turn on questions of Federal law."

In *Chase Manhattan Bank v. South Acres Development Co.,* 434 U.S. 236, 54 L.Ed.2d 501, 98 S.Ct. 544 (1978), the Court found that Guam alone among all the district courts of the land did not have diversity jurisdiction because Congress had not expressly authorized it. In *Granville-Smith v. Granville-Smith,* 349 U.S. 1, 75 S.Ct. 553, 99 L.Ed. 773 (1955), "the rightful nature of territorial legislation was assailed" and the Court simply found that Congress did not intend to give the Virgin

Islands' Legislature power to do what no state had ever attempted.

Each of these cases involved the Court limiting the power of the territory because it found no Congressional intent to allow the territory to exercise the power. These cases explicitly reveal the error of the Ninth Circuit in failing to understand Congress' grant of local autonomy, for they recognize the right of the territory to pass local legislation, but found that the power sought was beyond that intended by Congress. Although as *Andersen* instructs, Congress could give Guam the right to burden commerce, there is no reference in the Organic Act to such power. The Ninth Circuit, however, without any indication of any Congressional intent in support of its radical decision, has given its endorsement to the Territory of Guam to burden interstate commerce. The question, "Has Congress expressly authorized the territory to exercise this power?", has been twisted completely around to frame the question, "Has the commerce clause been extended to Guam?"

The Ninth Circuit reaches this extreme and unprecedented result on the basis of two inapplicable cases, *Buscaglia v. Ballester,* 162 F.2d 805 (1st Cir.), *cert. denied,* 332 U.S. 816 (1947), and *U.S. v. Husband R. (Roach),* 453 F.2d 1054 (5th Cir. 1971), *cert. denied,* 406 U.S. 935 (1972).

Buscaglia is apparently not even followed in the First Circuit. *See Caribtow v. Occupational Safety and Health Commission,* 493 F.2d 1064, p. 1068 n. 11 (1st Cir. 1974); *Sea-Land Services, Inc. v. Municipality of San Juan,* 503 F.Supp., 533, 540 (D.P.R. 1980) (District Court of Puerto Rico describes the conclusion in *Ballester* that the commerce clause is inapplicable to Puerto Rico as "unexpounded dicta.")

Husband R. (Roach) is simply inapplicable to a territory that has been granted local legislative power because the text of the case itself recites that:

> "Congress legislates directly for the Canal Zone, there is no local legislature."

Id. at 1057.

Relying upon this slender authority, the Ninth Circuit rejected

Andersen, supra, and a solid line of case authority within its own circuit that applied the commerce clause to Guam. *See Pacific Broadcasting Corp. v. Riddell,* 427 F.2d 519 (9th Cir. 1970) (gross receipts tax not violative of the commerce clause); *Asiatic Trans-Pacific, Inc. v. Maddox,* 371 F.2d 132 (9th Cir. 1967) (gross receipts tax not violative of the commerc clause); *Manila Trading & Supply Co. v. Maddox,* 335 F.2d 150 (9th Cir. 1964) (gross receipts tax violative of the commerce clause).

Also ignored were cases from the Third Circuit relating to the U.S. Virgin Islands, an unincorporated territory like Guam, that has the power of local legislation. *See e.g. Port Construction Co. v. Government of Virgin Islands,* 359 F.2d 663 (3rd Cir. 1966) (gross receipts tax not violative of commerce clause); *Southernland v. St. Croix Taxi Association,* 315 F.2d 364 (3rd Cir. 1963) (franchise agreement between government and taxicab association preventing interstate travelers from using prior contracted for transportation from airport to hotel violation of the commerce clause).

An ironic feature of the Ninth Circuit's decision is its overruling *Duty Free Shoppers, Ltd. v. Tax Commissioner,* 464 F.Supp. 730 (D.Guam 1979), which held that Guam was bound by the same limitations as binds the states with respect to both the commerce clause and the import/export clause. This case recently was cited with approval in the cases of *Sea-Land Services, Inc. v. Municipality of San Juan,* 505 F.Supp. 533 (D.P.R. 1980), and *JDS Realty Corp. v. Government of Virgin Islands,* 593 F.Supp. 199 (D.V.I. 1984). These latter cases held that neither the Government of Puerto Rico not the Government of Virgin Islands can burden interstate and foreign commerce.

In summary, the decision of the Ninth Circuit has reversed long established precedent, rejected sound reasoning and thrown into confusion the issue of Congress' power over the territories under the commerce clause.

II

THE GRANT OF ANTITRUST IMMUNITY TO THE GOVERNMENT OF GUAM IS A JUDICIAL INCURSION ON THE EXCLUSIVE RIGHT OF CONGRESS TO MAKE RULES AND REGULATIONS FOR THE TERRITORIES AND IS IN CONFLICT WITH THE LAW IN THE DISTRICT OF COLUMBIA COURT OF APPEALS.

The Ninth Circuit has completely ignored or misunderstood the purpose of the Organic of Guam and its amendment. Equating Guam to the Alaska R.R. and other federal administrative or executive type agencies is unprecedented in the case law, contrary to the holding in *United States v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), and conflicts with the law in the District of Columbia Circuit Court of Appeals. The decision also flagrantly violates the clear Congressional intention to grant the people of Guam local self government which was the fulfillment of a treaty obligation undertaken when the Senate ratified the United Nations Charter. *Senate Rep. No. 2109, 81st Congr.,* Reprinted in 1950 U.S. Code Congr. and Ad. News 2849; *H.R. Rep. No. 1521, 90th Congr.,* Reprinted in 1968 Code Congr. and Ad. News 3564. Allowing this decision to stand is an insult to the citizens of Guam who believe they are participating in the democratic process of local government, and it will provide foreign powers hostile to the United States with a legitimate claim that the U.S. is not abiding by its commitment to provide for local self government in its territories.

With this decision the Ninth Circuit has clearly overstepped the boundaries of the judiciary and wandered into the exclusive preserve of Congress. They have done this based primarily on a mistaken understanding of the meaning of *Wheeler. Wheeler,* while stating that Guam is "entirely the creation of Congress" (a statement with which we have absolutely no argument), does not equate Guam with the type of federal agency or instrumentality represented by the Alaska R.R. and the Federal Reserve Bank of Atlanta. Rather, *Wheeler,* and the cases cited therein, at length explains that the relationship of a territory to the federal government is like a city to a state. Territories are subject to the ultimate control of Congress and cities to the control of the states that created them. They are political subdivisions of their federal and state sovereigns. *Wheeler,* 435 U.S. at 319 n.2, 321 n. 17.

This case is important because now Guam and the Virgin Islands and possibly Puerto Rico and the Northern Mariana Islands will be classified as nothing more than federal robots. The Supreme Court should grant certiorari on this issue because to do otherwise will leave a judicial decision which clearly contradicts the intention of Congress to give Guam self government, an intention that was framed in light of United States obligations under the Charter of the United Nations.

Because the clear intention of Congress is to put Guam not in the status of federal robot but rather in the status of a city under federal sovereignty, it is logical that Guam should adhere to the same laws that apply to cities. Guam with the power of local legislation is in the same position as a city government relative to the antitrust laws. It has the power to pass laws which may interfere with the national policy of promoting competition and may makes choices counseled solely by its own parochial interest without regard to anticompetitive effects. *City of Lafayette, Louisiana v. Louisiana Power and Light Co.,* 435 U.S. 389, 408, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978).

Immunity from antitrust laws is not be lightly implied. *United States v. First National City Bank of Houston,* 386 U.S. 361, 368 (1967). It may be granted only by the sovereign, which in the United States may be only the U.S. or the individual state. *Community Communications Co. v. City of Boulder, Colo.,* 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982). There is simply no authority for the proposition that a local territorial government, whose chief executive officer is elected by the People of Guam, and an autonomous agency of this government, whose directors are appointed by that chief executive, may exempt themselves from federal antitrust laws.

Because *Wheeler* teaches that Guam should be considered a city and *Lafayette* and *City of Boulder* hold that cities are liable under the antitrust laws unless the sovereign immunizes them, the question to be answered in this case should be whether

Congress, as the sovereign, has expressed its intention to immunize Guam from the reach of the antitrust laws.

The District of Columbia Court of Appeals has used this intent test twice in determining the applicability of the antitrust laws to governmental entities in the District of Columbia. In *Hecht v. Pro Football, Inc.,* 444 F.2d 931 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972), an agency of the District of Columbia government charged with running the sports stadium (in this case we have an agency of the Government of Guam charged with running the airport) was found liable under the antitrust laws because Congress had not expressed its intention to immunize the board, the court noting that immunity from the antitrust laws was not lightly to be implied. In *Feldman v. Gardner,* 661 F.2d 1295 (D.C. Cir. 1981), *cert. granted,* 102 S.Ct. 3481 (1982), *vacated on other grounds,* 103 S.Ct. 1303 (1983), the District of Columbia Court of Appeals was found to be immune from antitrust challenge because Congress had intended that they be so immune. The Ninth Circuit in addition to being at odds with the U.N. Charter, the expressed intent of Congress, and the case of *United States v. Wheeler,* is also in direct conflict with the District of Columbia Court of Appeals in that it has found antitrust immunity without finding a Congressional intent to immunize.

CONCLUSION

The basic mistake that the Ninth Circuit made in both of these questions is the failure to understand that Guam has a thriving and dynamic local government which does not receive daily operating instructions from Washington. It forged a new concept of federal territories without any basis or authority. It is important for the Supreme Court to grant certiorari in this case to bring order to the case law and coherence to the federal territorial relationship established by the Constitution and the laws of the United States.

Respectfully submitted,

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[Appendices follow]

APPENDICES

Appendix A

District Court of Guam
Territory of Guam
Civil Case No. 82-0009

Yosh Sakamoto, et al.,
Plaintiffs,
v.
Duty Free Shoppers, Ltd., et al.,
Defendants.

[Filed December 7, 1983]

MEMORANDUM ORDER

STATEMENT OF THE CASE

Plaintiffs[1] filed their original complaint in this action February 8, 1982, and then filed an amended complaint on February 16, 1982. The Plaintiffs allege that beginning on or before December, 1976, and continuing to the present, the Defendants Guam Airport Authority and Duty Free Shoppers, Ltd. (hereinafter referred to as the "GAA" and "DFS," respectively) engaged in unlawful combination and conspiracy in restraint of interstate commerce by entering into contracts which conferred upon DFS exclusive rights for the sale and delivery of certain merchandise at the Guam International Airport Terminal (hereinafter referred to as "GIAT") and by enforcing such contracts against the efforts of Plaintiff Pacific Gift Supply (hereinafter referred to as "PGS") to deliver merchandise at the GIAT.

The Plaintiffs further allege that this conduct has harmed them and that it violates Sections 1, 2, and 3 of the Sherman Act, 15 U.S.C. §§ 1-3, 42 U.S.C. § 1983, 48 U.S.C. § 1471, the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States, and the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States. Jurisdiction is invoked by the Plaintiffs pursuant to 28 U.S.C. §§ 1331, 1337, and 1343; and 15 U.S.C. §§ 15 and 26.

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[1] The Amended Complaint was originally filed by six plaintiffs. However, the Court dismissed with prejudice the claims of three of those plaintiffs — Hakubotan, Inc., Jenny's Fashion, Inc., and Para Para, Inc. — by a court order dated January 10, 1983, for refusal to respond to DFS' First Set to Interrogatories and First Request of Production of Documents dated June 25, 1982.

On May 16, 1983, Plaintiff "PGS" filed a motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure contending that the exclusive concession agreement between GAA and DFS and the enforcement of such agreement against the efforts of PGS to deliver merchandise at the GIAT violates Section 1 of the Sherman Act, 15 U.S.C. § 1, the Commerce Clause of the Constitution of the United States, the Equal Protection Clause of the Fourteenth Amendment to the Constitution, and "public policy".

The Defendants filed a cross-motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on May 19, 1983. The Defendants maintain that the exclusive contracts between GAA and DFS are lawful, reasonable and procompetitive. The Defendants, in their memorandum in support of summary judgment, addressed every claim set forth by the Plaintiffs in their complaint. The Plaintiffs, however, have not only failed to address certain arguments of Defendants, but have limited their claims to the exclusive delivery rights conferred to DFS by the GAA. This court will, therefore, limit its decision to claims relating to the exclusive delivery rights issue and dismiss the following claims which were not addressed by the Plaintiffs:

1) Claims pursuant to 42 U.S.C. § 1983 and 48 U.S.C. § 1471.

2) Claims pursuant to the due process clauses of the fifth and fourteenth amendments.

3) Claims pursuant to the fourth amendment.

On August 19, 1983, the Plaintiffs filed a motion to amend responses to requests for admissions. The Court heard the motion to amend responses to requests for admissions, the Plaintiffs' partial summary judgment motion and the Defendants' motion for summary judgment on August 30, 1983. The Plaintiffs were represented by William M. Fitzgerald; the Defendant "DFS" was represented by Jay N. Fastow and

William J. Blair; the Defendant "GAA" was represented by Richard Pipes; and the Defendant Government of Guam was represented by Margaret E. Bean, Assistant Attorney General. The Court denied Plaintiffs' motion to amend admissions and took the other motions under advisement.

STATEMENT OF FACTS

The Department of Commerce of the Government of Guam directly managed and operated the GIAT until 1975. In 1975, the Guam Legislature enacted Public Law 13-57, entitled the "Guam Airport Authority Act", creating the Guam Airport Authority ("GAA"), as a public corporation and autonomous instrumentality of the Government of Guam, to manage and operate the GIAT.

In 1967, the Government of Guam entered into an exclusive merchandise concession agreement with Jones & Guerrero Company with regard to the GIAT. In 1972, the exclusive merchandise concession agreement was assigned from Jones & Guerrero Company to DFS with the approval of the Government of Guam. In 1978, the GAA, by competitive bid, offered an exclusive concession at the GIAT for a term of fifteen (15) years with an option for the concessionaire to extend the concession for an additional five years. At this same time, the GAA was also engaged in planning the financing and construction of a new air terminal at the Airport. The construction was to be financed through the sale of revenue bonds, which were to be entirely supported by the payments under the 1978 concession agreement.

The GAA publicized the availability of the concession in the *Pacific Daily News,* the local newspaper on Guam, and the *Wall Street Journal* and made the bid open to any party who could meet the following qualifications set forth by the GAA:

> ". . . being in existence for 5 years, at least 3 years immediate prior experience operating similar airport concessions with annual volume $10 million and financial strength to provide unconditional minimum guarantee, advance cash deposit and start-up capital

> including all tenant improvements . . . [with] [m]inimum acceptable guarantee [of] $15 million with 10 percent advance cash deposit . . ."

A few parties were interested in the exclusive concession but DFS submitted the highest bid (over $140,000,000.) and was awarded the exclusive concession at the GIAT. The concession agreement was executed between GAA and DFS on October 18, 1978. It should be noted that the Plaintiffs did not make a bid, did not object to the bid qualifications set forth by the GAA, and did not seek to influence the GAA to offer sale or delivery privileges on a non-exclusive basis.

On the basis of the guaranteed fees from DFS under the 1978 concession agreement, the GAA sold $43 million in revenue bonds in 1979. Using the funds it received from the sale of these bonds, the GAA began constructing a new terminal complex at the Airport in 1980. The new airport terminal was completed and opened for beneficial occupancy on January 20, 1982, at a cost to GAA in excess of $50 million.

The Plaintiff, PGS, has attempted on numerous occasions to deliver its merchandise to the airport terminal. At first, the Plaintiff would sell its merchandise and accept payment from the tourist and then deliver it to the airport and check it in. In April, 1976, an attorney for DFS informed the airlines that the pre-check-in procedure violated FAA rules and the airlines discontinued this practice. From April until August, 1976, the candy was sold to the tourist and paid for, then delivered to the airport and carried to the check-in counters by PGS employees. The tourist would then pick up the merchandise and check it in.

On June 7, 1976, S. T. Leon Guerrero, Acting Executive Manager of the GAA, sent a letter to Mr. Yosh Sakamoto advising him to "immediately cease delivery of any merchandise to departing passengers at GIAT".

PGS continued the practice of delivering to the check-in counter between September, 1976, and February, 1977.

On February 2, 1977, David Tancap, Executive Manager of the GAA, sent a letter to Mr. Yosh Sakamoto of PGS stating the following:

> "It has again been brought to our attention that you are still delivering candy to departing passengers at the Guam International Air Terminal (GIAT). You were advised to cease delivery of any merchandise to departing passengers at GIAT by my June 7, 1976 letter which you received in August, 1977 [sic]. Therefore, I am again advising you to immediately cease delivery of any merchandise to departing passengers at GIAT. Furthermore, I have instructed our Operations Officer to evict you or your representative from the airport if you continue this practice.
>
> To make myself perfectly clear, I will take all necessary measures under the law to protect the rights of tenants/concessionaires of the Guam Airport Authority (GAA)."

On the basis of Tuncap's instructions, PGS discontinued deliveries to the airport and instead delivered to the hotels. Then the candy was placed on the tour bus and PGS employees would off-load the merchandise and carry it to the check-in counter. This practice continued through 1978 and until February, 1979.

On March 14, 1979, Manual F. L. Guerrero, Executive Manager of GAA, sent a letter to Mr. Sakamoto requesting PGS to cease delivery of goods to passengers or would-be passengers at GIAT. Mr. Sakamoto was further informed that this regulation applied to everyone, not just PGS.

Subsequently, PGS requested that the tour agents and bus drivers assist the tourists with their merchandise at the GIAT. The tour agents and bus drivers were then compensated by PGS for their service.

A letter dated March 10, 1980, was sent by th attorney for GAA notifying the attorney for PGS that the GAA has the authority to prohibit Sakamoto or PGS employees from delivering candy to departing passengers at GIAT pursuant to § 100.3 of Rules and Regulations of the GAA and has the further right to eject Sakamoto or PGS employees from the airport premises pursuant to § 100.6(B) of the GAA Rules and Regulations if they continue such practices.

Subsequently, this lawsuit was filed by the Plaintiffs.

I. GOVERNMENTAL ACTION IMMUNITY

The Defendants maintain that the conduct challenged by the Plaintiffs, i.e., the granting and enforcing by the GAA of exclusive Airport merchandise delivery rights, is immune from antitrust scrutiny since such conduct is governmental action.

The State Action Immunity Doctrine

The Defendants initially contend that the conduct challenged by the Plaintiffs is immune from antitrust scrutiny under the *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) "state action" immunity doctrine. In *Parker, Id.,* the Supreme Court determined, after carefully reviewing the legislative history of the Sherman Act, that Congress intended the Act to restrain only private anticompetitive action, not state action directed by the legislature.

It appears that the Plaintiffs and the Defendants are in agreement that the challenged conduct in this case is governmental action. The Plaintiffs, however, reject the Defendants argument that the *Parker* "state action" immunity doctrine applies to the Territory of Guam. This Court is an agreement with the Plaintiffs that the Territory of Guam cannot be considered a state for the purposes of determining the applicability of the Antitrust laws. It is apparent that the principle of federalism underlies the "state action" immunity doctrine. As the Supreme Court stated in *Parker, Id.* at 351,

> "[i]n a dual system of government in which under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly attributed to Congress."

Thus, since the Eleventh Amendment to the Constitution of the United States does not encompass unincorporated territories, the Territory of Guam lacks the sovereignty of a state.[2]

The Federal Action Immunity Doctrine

The Defendants also maintain that all federal agencies and instrumentalities are absolutely immune from antitrust scrutiny. *Sea-Land Service, Inc. v. Alaska Railroad,* 659 F.2d 243, 244 (D.C. Cir., 1981) *cert. denied,* 455 U.S. 919 (1982); *Feldman v. Gardner,* 661 F.2d 1295 (D.C. Cir., 1981) *cert. granted, District of Columbia Court of Appeals v. Feldman,* 102 S.Ct. 3481 (1982), and *vacated on other grounds,* 103 S.Ct. 1303 (1983); and *Webster County Coal Corp. v. Tennessee Valley Authority,* 476 F.Supp. 529, 532 (W.D. Kentucky, 1979). It follows that the Defendants then assert that the GAA and the Government of Guam are agencies and instrumentalities of the federal government and as such are absolutely immune from antitrust liability. The Plaintiffs, on the other hand, contend that the Territory of Guam should be treated as a municipality and, therefore, not entitled to antitrust immunity.

It is the Court's determination that the Government of Guam and, indirectly, the GAA, are federal agencies and instrumentalities for the purposes of the Antitrust law and that their challenged conduct is immune from antitrust scrutiny. Pursuant to the Organic Act of Guam, 48 U.S.C. § 1421a and § 1423a, Congress expressly created the Government of Guam and authorized it to regulate all matters of local concern. The Government of Guam, acting as an agent and instrumentality of the Congress in this respect, created the GAA as "a public corporation and autonomous instrumentality of the Government of Guam" (§ 62001 of the Government Code of Guam) "to acquire, construct, reconstruct, purchase, extend, improve, better, operate and maintain airports and related facilities for civil aviation purposes on Guam". § 62003 of the Government Code of Guam.

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[2] Since this Court has determined that the Territory of Guam cannot be considered a State within the context of the Antitrust laws, it will not address the two-prong test applied to independent political subdivisions of a State set forth in *California Retail Liquor Dealers' Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980).

i.e., (a) "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy," and

(b) "the policy must be actively supervised by the State itself".

Although the Government of Guam granted the GAA broad discretionary powers, it is apparent to this Court that the Government of Guam was concerned with the financial stability of the Airport and expressly limited and restricted the GAA's authority in this particular area. First, the Government of Guam enacted a comprehensive statutory scheme to authorize and encourage the issuance of revenue bonds. § 62100 et seq. of the Government Code of Guam. Second, the Government authorized and required the GAA to "manage and operate the Airport in the most efficient manner consistent with the protection of the bondholder" and "to keep the Airport on a self-sustaining basis." §§ 62010 and 62114 of the Government Code of Guam. It is obvious that the main concern of the Government of Guam was to ensure the protection of the bondholder and financial stability of the Airport. In order to assure this necessary protection and stability, after consultation with its financial advisors, the GAA determined that is had to have guaranteed income from a merchandise concession for 15-20 years. (See affidavit of R. M. Stone at p. 4.) It is, therefore, apparent to this Court that the GAA was acting in accordance with the mandate of the Government of Guam when it entered into the exclusive Airport merchandise concession agreement with DFS. As previously stated, DFS submitted the highest bid, over $140,000,000. in guaranteed concession fees for a period of 15 years, (with an option for DFS to extend for an additional five years) and on the basis of such guaranteed fees the GAA was able to sell $43 million in revenue bonds to finance the construction of the new terminal complex at the Airport. If it were not for the exclusive nature of the concession, no firm would have bid the amount bid by DFS to secure the revenue bonds. (See affidavit of R. M. Stone, at p. 5.)

In addition, it is obvious that the Government of Guam contemplated the granting of the exclusive airport concession by GAA since the policy of exclusive merchandise concessions at the Airport has been continually and specifically approved by the Government of Guam. In 1967, the Government of Guam originally adopted the policy of exclusivity when it directly operated the airport and conferred exclusive concession rights to J & G Company. In 1972, the Government of Guam reaffirmed its policy of exclusivity by assigning the exclusive merchandise concession agreement from J & G Company to DFS. Finally, in 1979, at the request of the Governor, the Government of Guam, impliedly approved the policy of exclusive Airport delivery rights by adopting Resolution I-S, in which is expressed its approval of the GAA's amendment of the exclusive concession agreement with DFS and authorized the sale of bonds which would be supported by revenues accruing under such agreement.

Thus, it is clear to this Court that with respect to the conduct challenged by the Plaintiffs, the GAA was acting as the alter ego of the Government of Guam in its capacity as a federal agency and instrumentality and is to be afforded the same immunity from the Antitrust laws.

The Court feels the need at this time to distinguish the case of *Hecht v. Pro Football, Inc.*, 444 F.2d 931 (D.C. Cir., 1971), *cert. denied,* 404 U.S. 1047 (1972), upon which the Plaintiff has placed great reliance. In *Hecht,* the District of Columbia Armory Board was established by the Department of the Interior to provide a stadium for District of Columbia sports teams. The Board entered into a contract with the Redskins containing a restrictive covenant prohibiting the use of the stadium by any professional football team other than the Redskins for a period of 30 years. The United States Court of Appeals for the District of Columbia Circuit held that the Armory Board was not immune from antitrust liability. The Plaintiffs analogize Washington, D.C. to Guam and the Armory Board to the Guam Airport Authority. The Plaintiffs maintain that Washington, D.C. and the Territory of Guam are both local governments created by the United States Congress and that both the D.C. stadium Board and the GAA are local instrumentalities set up to administer public facilities under those local governments. Therefore, the Plaintiffs contend that the actions of the Government of Guam and GAA are not immune from antitrust liability.

A more recent case from the D.C. Circuit, however, has held that acts of the local Court of Appeals were immune from the antitrust laws, because that court was "plainly a federal instrumentality". *Feldman v. Gardner, supra* at 1307. The *Feldman* court distinguished and clarified its holding in *Hecht*, stating that the Armory Board was not immune from antitrust liability since it was commissioned to operate the stadium as a private venture.

The operation of the GIAT by the GAA can certainly not be characterized as the operation of the private venture. The GIAT is the only commercial airport on the island of Guam providing essential air service to the people of Guam. Additionally, tourism is a major industry on Guam and the airport system is essential to the tourism industry and its expansion. Thus, it is evident that the people of Guam are dependent upon the GIAT for their economic well-being and that the GAA as a public authority maintains and operates the GIAT in the best interest of the public.

With regard to the actions of DFS in relation to the immune conduct of the GAA and the Government of Guam, it is the determination of this Court that such actions of DFS also fall outside the purview of the Sherman Act's prohibition. *Medical Association of the State of Alabama v. Schweiker*, 554 F.Supp. 955, 966 (N.D. Alabama, 1983).

Thus, the challenged conduct of the GAA, the Government of Guam and DFS is immune from antitrust scrutiny.

The Noerr-Pennington Doctrine

The *Noerr-Pennington* doctrine provides that the efforts of private persons to influence the operation of government for their own economic advantage are immune from the operation of the antitrust laws. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); and *California Motor Transport Company v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972).

The Plaintiffs agree that the *Noerr-Pennington* doctrine immunizes lobbying efforts, but contend that this case is not covered by the doctrine since it involves a conspiracy between DFS and GAA evidenced by a written agreement which results in a restraint of trade. The Defendants reply that the claims filed against DFS by the Plaintiffs relate only to allegations that it influenced the GAA to execute and enforce the exclusive merchandise agreements.

Paragraph 21 of the Plaintiffs' Amended Complaint states:

> "The aforesaid conspiracy consisted of a continuing agreement . . . to obtain an exclusive dealing arrangement for concession sales and deliveries at the Airport, and to prohibit such sales and deliveries by any party other than Defendant Duty Free."

It appears to this Court that Paragraph 21 of the Plaintiffs' Amended Complaint sets forth exactly the type of efforts which are immune from antitrust scrutiny pursuant to the *Noerr-Pennington* doctrine. It is, therefore, the determination of this Court that even if DFS engaged in such efforts it is immune from antitrust liability.

However, as evidenced by the affidavit of R. M. Stone, the exclusivity of the Concession Agreement resulted from the GAA's unilateral decision to offer such sale and delivery rights on an exclusive basis. Thus, there was no active government involvement in restraint of trade, no concerted action and, therefore, no violation of Section 3 of the Sherman Act. *United States v. Colgate & Company*, 250 U.S. 300, 39 S.Ct. 465, 63 LE 992 (1919).

II. STANDING

In addition to the challenged conduct of the GAA, the Government of Guam and DFS being exempt from antitrust scrutiny on the basis of the federal action immunity and the Noerr-Pennington doctrine, this Court further concludes that the Plaintiffs do not have standing to bring this action.

Title 15 U.S.C. § 15(a) (Section 4b of the Clayton Act) states as follows:

> ". . . any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

In order to have standing under § 15, the Plaintiff must establish injury to his business or property that occurred by reason of an antitrust violation. The Plaintiff must further show that the loss to his business or property was caused by the alleged antitrust violation. *Solinger v. A & M Records, Inc.*, 586 F.2d 1304, 1308-1309 (9th Cir., 1978), *cert. denied*, 441 U.S. 908 (1979).

Legal Injury to Business or Property

The GAA and the Government of Guam are fully empowered to regulate the commercial use of the Airport. In fact, without written permission from GAA, it is unlawful for anyone to use Airport premises for commercial purposes. Sections 3030.3 and 3039.5 of the GAA Rules and § 62013 of the Government Code of Guam. As the Plaintiffs admit, they have never received permission from GAA or the Government of Guam to sell or deliver goods at the Airport. Thus, the Plaintiffs, by reason of the exclusive merchandise concession agreements and their enforcement, have not been deprived of any legal right which they had previously and thus cannot claim any legal injury to their business or property.

Furthermore, the Plaintiffs have no right to conduct their businesses on others' property, [*Donovan v. Pennsylvania Company*, 199 U.S. 279, 26 S.Ct. 91, 50 L.Ed. 192 (1905) and *Export Liquor Sales, Inc. v. Ammex Warehouse Company, Inc.*, 462 F.2d 251 (6th Cir., 1970), *cert. denied*, 400 U.S. 1000 (1971)] and no right to deal with the GAA or the Government of Guam. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940).

Additionally, the GIAT is not, as the Plaintiffs contend, a facility which is essential to the ability of the Plaintiffs to conduct their businesses. As noted in *Hecht v. Pro Football, Inc.*, 570 F.2d 982, 993 n. 45 (D.C. Cir., 1977), *cert. denied*, 436 U.S. 956 (1978), a facility is essential to the ability of competitors to do business, where, without access to that facility, "all possible competition is by definition excluded". As evidenced by the Plaintiffs' admissions, they have businesses and have been able to conduct such businesses and earn profits without the use of the Airport to make their commercial deliveries. To permit the Plaintiffs to use the Airport to make their commercial deliveries is certainly not essential to their businesses; it would merely provide an added convenience to their customers.

Thus, the Plaintiffs have failed to establish any legal injury to their businesses.

Antitrust Injury

The second element necessary to establish standing is that a Plaintiff must show an antitrust injury, i.e., that he has been injured by a decrease in competition. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). As the Defendants correctly argue, no one has the right to do business at GIAT without the written permission of the GAA; so by the GAA granting the DFS concession, competition has actually increased the sale of merchandise in Guam since such sale and delivery services provided by DFS at the Airport would have been non-existent. It must be emphasized that the Plaintiffs are not being denied the use of the GIAT for collateral non-transportation purposes, i.e., to make commercial deliveries. They are not being deprived of the use of the GIAT for transportation purposes.

Thus, there has been no antitrust violation or injury.

Causal Nexus between Antitrust Violation and Injury

The Plaintiffs have failed to convince this Court that their purported injury was the result of the alleged unlawful conduct.

When the 1967 concession agreement was awarded by the Government of Guam, the Plaintiffs' businesses were nonexistent. In 1978, it was the unilateral decision of GAA, pursuant to its statutory authority, to grant an exclusive concession to insure the financial stability of the airport and the protection of the bondholders. Additionally, it was the Plaintiffs' failure in 1978 to offer bids or to submit proposals to the GAA in an attempt to influence the GAA to alter the terms of the exclusive concession.

Moreover, it is evident that the Plaintiffs do not have the financial ability to meet the 1978 bid qualifications established by the GAA for the exclusive airport concession and, therefore, are not able to engage in the business from which they maintain they were excluded.

Thus, the Plaintiffs have failed to establish a causal nexus between the alleged antitrust violation and the purported injury.

ALLEGED UNLAWFUL CONDUCT IS REASONABLE

In order for a restraint of trade to be in violation of the antitrust laws, it must be "unreasonable" and anticompetitive. *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1381 (9th Cir., 1981), *cert. denied,* 454 U.S. 831 (1981) and *A. H. Cox & Company v. Star Machinery Company,* 653 F.2d 1302, 1305 (9th Cir., 1981). There are two rules which courts apply to determine whether conduct is unreasonable or anticompetitive. The first rule is the *per se* rule, i.e., that the conduct is unreasonable per se. The second rule is the rule of reason. *Ron Tonkin, supra.*

When a court applies the rule of reason test, it inquires as to the effect the challenged conduct has on competition. *Ron Tonkin, supra,* at 1388. If, however, the court identifies conduct which has been held to be unreasonable per se, it is barred from inquiring as to its reasonableness. In order for conduct to be conclusively presumed to be unreasonable, it must have a pernicious effect on competition and lack any redeeming virtue. *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

The Plaintiffs maintain that the challenged conduct in the case at bar is unreasonable per se. This Court does not agree. First, there is a need to distinguish between horizontal restraints and vertical restraints. A horizontal restraint is an agreement between competitors to refuse to deal with one or more persons, while a vertical restraint involves combinations of parties on different levels of the distribution system. It has been held that horizontal restraints are unreasonable per se. *Ron Tonkin, supra.*

The Plaintiffs do not contend that the challenged conduct amounts to a horizontal restraint but they do contend that the challenged conduct is unreasonable per se since it is a vertical restraint that has the presence of a horizontal element. In other words, the Plaintiffs contend that through the concerted action of DFS and the GAA, the GAA has refused to deal with the Plaintiffs (competitors of DFS) and, hence, that the per se rule should be applied. This Court, however, must reject this argument. As previously mentioned, the exclusivity of the Airport concession agreement did not result from concerted action between DFS and the GAA, but from the unilateral decision of the GAA to offer sale and delivery rights on an exclusive basis. Even if this Court infers that DFS and the GAA acted in concert, this Court is only justified in applying the per se rule if "the challenged conduct clearly had, or was likely to have, a pernicious effect on competition and lacked any redeeming virtue." *Ron Tonkin, supra* at 1387. Such is not the case. It has already been stated in this decision that competition has actually been increased by the GAA permitting DFS to conduct business on the GIAT premises and that the exclusive concession agreement was essential to the financial stability of the Airport and benefits the tourism industry and the economy of the people of Guam.

Furthermore, the exclusive concession agreement is reasonable as a matter of law because it was offered pursuant to an open and fair competitive bid. *Parmelee Transportation Co. v. Keeshin,* 292 F.2d 794 (7th Cir., 1961) *cert. denied,* 368 U.S. 944 (1961) and *Bustop Shelters, Inc. v. Convenience & Safety Corp.,* 521 F.Supp. 989, 997 (S.D. N.Y., 1981).

III. THE STATUTE OF LIMITATIONS AND THE DOCTRINE OF LACHES

Finally, this Court determines that all claims filed by the Plaintiffs are barred by the four-year statute of limitations pursuant to 15 U.S.C. § 15b (Section 4b of the Clayton Act) and the doctrine of laches.

Title 15 U.S.C § 15b states as follows:

"§ 15b. Limitation of actions.

> Any action to enforce any cause of action under sections 15, 15a, or 15c or this title shall be forever barred unless commenced within four years after the cause of action accrued . . ."

It should also be noted that the above four-year statute of limitations period has been used by the Ninth Circuit as a guideline for the computation of the laches period in antitrust suits. *Aurora Enterprises v. National Broadcasting Co.*, 688 F.2d 689, 694 (9th Cir., 1982).

Statute of Limitations

The Defendants maintain that the Plaintiffs' cause of action accrued in 1976 or at least in 1977, the date of the Defendants' final refusal to deal with the Plaintiffs, and thus, this action is barred by the four-year statute of limitations. In a case such as this, where the Plaintiffs' claim is based upon the Defendants' refusal to deal with it, i.e., to allow Plaintiffs the right to sell or deliver at the airport terminal, the Plaintiffs' cause of action accrued at the time the Defendants made a final refusal to deal and no new or continuing claims are created by subsequent iterations of that refusal to deal. *In Re Multi-district Vehicle Air Pollution*, 591 F.2d 68 (9th Cir., 1979.), *cert. denied*, 444 U.S. 900 (1979) and *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936, 938 (9th Cir., 1981), *cert. denied sub. nom. David Orgell v. Joseph Wedgwood & Sons*, 102 S.Ct. 92 (1981).

As evidenced by the Plaintiffs' complaint (Paragraph 22(b) and (m) of Plaintiffs' amended complaint), and the letter from S. T. Leon Guerrero, the Acting Manager of the GAA, to Mr. Sakamoto dated June 7, 1976, the Plaintiffs have known since sometime prior to December, 1976, that their deliveries to the Airport were prohibited by the GAA. Even if Plaintiffs did not recognize the 1976 refusal to deal as absolute and final, it is evident that they recognized the refusal to deal as final in 1977. As stated in paragraph 22(c) of their complaint ". . . GAA forced Pacific Gift Supply to cease making delivery of any merchandise to departing passengers at the Airport in February, 1977". The 1977 final refusal to deal is further evidenced by the letter from David Tuncap, Executive Manager of GAA, to Mr. Y. Sakamoto, Pacific Gift Supply Company, dated February 2, 1977, in which the following was stated:

> "It has again been brought to our attention that you are still delivering candy to departing passengers at the Guam International Air Terminal (GIAT). You were advised to cease delivery of any merchandise to departing passengers at GIAT by my June 7, 1976 letter which you received in August, 1977 [sic]. Therefore, I am again advising you to immediately cease delivery of any merchandise to departing passengers at GIAT. Furthermore, I have instructed our Operations Officers to evict you or your representative from the airport if you continue this practice.
>
> To make myself perfectly clear, I will take all necessary measures under the law to protect the rights of tenants/concessionaires of the Guam Airport Authority (GAA) . . ."

Thus, the Plaintiffs' cause of action arose at least by 1977 and its claim filed in February, 1982, is barred by the four-year statute of limitations.

The Plaintiffs argue that their cause of action accrued in October, 1978, the date that the exclusive concession agreement between DFS and GAA was executed and this is still within the four-year statute of limitations period. This Court does not agree. The Defendants' final refusal to deal was expressed at least by 1977, and the offer of the new exclusive airport concession in 1978 in no way detracted from its finality since the policy of exclusive airport concessions at the Airport has been continually and specifically approved and enforced by the

Government of Guam and the GAA since 1967. Thus, the Plaintiffs had no reason to believe that the 1978 airport concession agreement would not be in conformity with the policy of exclusivity adopted by the GAA and the Government of Guam.

The Plaintiffs also contend that since they were hopeful of a work-out arrangement through March, 1980, their cause of action did not accrue until that time. This Court rejects this contention on the basis that the Plaintiffs cannot toll the running of the statute of limitations by claiming that they still had a hope of dealing with the Defendants. *Orgell, Inc., supra.*

Doctrine of Laches

The Court also feels that this is an appropriate case to invoke the application of the doctrine of laches since the Defendants have been prejudiced by the five-year delay of the Plaintiffs in bringing this suit. More specifically, the Plaintiffs could have filed their suit prior to 1978, or in 1978 when the new airport concession agreement was up for bid. However, the Plaintiffs *chose to wait until* after DFS guaranteed fees in the amount of $140,000,000. in the concession agreement, the GAA sold $43 million in revenue bonds in 1979 supported by the fees from the concession agreement, the GAA began to build a new airport terminal complex in 1980, and the new terminal complex was completed in 1982 at a cost in excess of $50 million to the GAA. It would be inequitable to permit the Plaintiffs to attempt to invalidate the concession agreement at this time after such a lengthy delay and after having allowed the Defendants to act in substantial reliance on the validity of such concession agreement.

IV. COMMERCE CLAUSE

The Plaintiffs also maintain that the restriction on deliveries to the Airport is an unreasonable burden on interstate commerce in violation of the Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution. This Court determines that there is absolutely no merit to this contention since Article I, Section 8, Clause 3 of the United

States Constitution has not been extended to Guam. 48 U.S.C. § 1421b(u).[3]

However, even if the Commerce Clause were extended to Guam, it is the Court's decision that the alleged conduct of the Defendants does not constitute an unreasonable burden on interstate commerce in violation of the Commerce Clause since, as previously mentioned, the Plaintiffs have no right to conduct their businesss at the airport terminal. Also, the fact that the GAA has permitted DFS to do business at the airport terminal has actually facilitated commerce. The guaranteed concession fees have provided the necessary revenues for the construction, maintenance and operation of the airport thus benefiting the tourism industry and the economic well-being of the people of Guam.

Additionally, since this Court has determined that the alleged conduct is immune from Sherman Antitrust scrutiny under the federal immunity doctrine, such conduct cannot be found to violate the Commerce Clause. The Congress in enacting the Sherman Antitrust Act has exercised its plenary commerce power to its fullest extent. *McClain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 241, 100 S.Ct. 502, 62 L.Ed.2d 441 (1979) and *United States v. American Building Maintenance Industries,* 422 U.S. 271, 278, 95 S.Ct. 2150, 45 L.Ed.2d 164 (1975). Thus, it follows that if the federal immunity doctrine is applicable to Sherman Act claims it is also applicable to a claim under the Commerce Clause. See *Western & Southern Life Insurance Co. v. State Board of Equalization of California,* 451 U.S. 648, 653, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981).

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[3] Section 1421b(u) of Title 48 USCA states in pertinent part as follows:

> "(u) The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

V. EQUAL PROTECTION

Section 100.3 of the GAA Rules and Regulations states as follows:

> "No person shall carry on any commercial activity at the airport without the written consent of the authority."

The Plaintiffs maintain that the granting of the exclusive delivery rights to DFS was an arbitrary and capricious application of the regulation by the GAA which has created an invidious discrimination by denying use of the GIAT to one business while granting it to another in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

This argument must fail since the Plaintiffs have no right to conduct their businesses at the airport terminal and the exclusive concession agreement was granted pursuant to a fair and competitive bidding procedure. The Plaintiffs were not discriminated against; they merely failed to seek the exclusive concession when it was offered and further failed to offer a proposal to the GAA concerning the granting of non-exclusive delivery privileges.

Moreover, the equal protection law will not reach a situation where a government is engaged in economic regulation that is rationally related to a legitimate governmental interest. *City of New Orleans v. Dukes,* 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) and *Benson v. Arizona State Board of Dental Examiners,* 673 F.2d 272 (9th Cir., 1982).

In the case at bar, the granting of the exclusive airport concession by the GAA pursuant to its statutory authority passes the rationality test. The purpose of the exclusive concession was to maximize Airport revenues to expand and improve the operations of the Airport and ensure the financial stability of the Airport, thereby promoting the tourism industry and the economic well-being of the Territory of Guam. This Court concludes that the GAA and the Government of Guam could reasonably decide that in order to expand and improve the operations of the GIAT, keep the airport on a self-sustaining basis and protect its bondholders, that it needed to grant an exclusive merchandise concession agreement with guaranteed income from such concession for a period of at least 15 to 20 years to a party who could meet the bid qualifications set forth by the GAA. *supra, p. 0.*

Thus, this Court determines that there is no denial of equal protection since the judgments of the GAA and the Government of Guam are rationally related to a legitimate governmental interest.

CONCLUSION

There being no material issue of fact in dispute, it is the determination of this Court that the Defendants are entitled to their motion for Summary Judgment as a matter of law. To hold otherwise would result in a substantial loss of guaranteed concession fees for the GIAT[4] which, in turn, would have a devastating effect on the financial stability of GIAT, GAA's ability to operate, maintain and improve the Airport, tourism, the economy of Guam, and the people of Guam.

Thus, Plaintiffs' Partial Motion for Summary Judgment is denied and the Defendants' Motion for Summary Judgment is granted.

So Ordered.

Dated this 6th day of December, 1983.

CRISTOBAL C. DUENAS
Judge, District Court of Guam

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[4] If there is an interruption or loss of any of the concessionaire's exclusive rights for a period in excess of sixty (60) days, the guaranteed fee to GAA in the amount of $140,000,000. will be reduced to an amount in no event greater than $74.1 million. Concession Agreement dated October 18, 1978, §§ 1.06, 7.01(e) and 7.02(b).

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 84-1587

D.C. No. C-82-0009-CCD

Yosh Sakamoto, et al.,
Plaintiffs-Appellants,
v.
Duty Free Shoppers, Ltd., et al.,
Defendants-Appellees.

OPINION

Argued and Submitted November 8, 1984

Filed July 1, 1985

Appeal from the District Court of Guam
Territory of Guam
Cristobal C. Duenas,
District Judge, Presiding

BEFORE: HUG, TANG, and SCHROEDER, Circuit Judges.

SCHROEDER, Circuit Judge.

The plaintiffs are in the business of selling gifts to tourists in Guam. They brought this action challenging the legality of an exclusive concession agreement giving one of their competitors, Duty Free Shoppers, Ltd., exclusive rights to sell and deliver certain kinds of merchandise to departing passengers at the Guam Airport Terminal. The defendants in this suit are the parties to the concession agreement: Duty Free, the Government of Guam, the Guam Airport Authority, and the Authority's executive manager.

The district court granted summary judgment for the defendants and dismissed the action. The plaintiffs' principal contentions on appeal are that the concession agreement burdens interstate and foreign commerce in violation of the Commerce Clause of the United States Constitution and violates the antitrust laws. We affirm.

The business of plaintiffs and Duty Free is primarily aimed at Japanese tourists in Guam who purchase gifts or "omiyage" to carry back to Japan. The exclusive concession practice in question here began in 1967, and the current contract was entered into in 1978 as the result of competitive bidding. Duty Free submitted the highest bid, $140 million, and was awarded the fifteen year concession which gave it the exclusive right to sell and deliver specified merchandise at the airport. Proceeds from the contract represent a major source of funding for the construction and maintenance of the airport terminal.

In their challenge to the contract as violative of the commerce clause, plaintiffs do not contest the right of the Government of Guam and the Airport Authority, its agency, to limit by contract the number of businesses permitted to make sales on the premises of the airport. Nor do plaintiffs contend that the contract directly interferes with their ability to sell to customers elsewhere. Plaintiffs complain about the limitation on their right to deliver goods at the airport. They contend that the exclusive contract with Duty Free, which prevents them from delivering previously purchased merchandise to departing passengers as they arrive at the airport, is an undue burden on interstate and foreign commerce.

The defendants' threshhold response to this argument, and one with which we agree, is that the limitations which the commerce clause places upon the power of state governments to burden commerce do not apply to the Government of Guam because Guam is not a state. The defendants correctly point out that these limitations on states, the "negative implications" of the commerce clause, flow from the commerce clause's grant of plenary authority over commerce to Congress. "[T]he states have not been deemed to have authority to impede substantially the free flow of commerce . . . or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Southern Pacific Co. v. Arizona,* 325 U.S.

761, 767, 65 S.Ct. 1515, 1519, 89 L.Ed. 1915 (1945) (footnote omitted). The historical role of the commerce clause has been confined to limiting regulatory and taxing actions by states which may interfere with federal sovereignty. *See* L. Tribe, *American Constitutional Law* at 336 (1978), *quoted in Reeves, Inc. v. Stake,* 447 U.S. 429, 437, 100 S.Ct. 2271, 2277, 65 L.Ed.2d 244 (1980).

Since Guam is an unincorporated territory enjoying only such powers as may be delegated to it by the Congress in the Organic Act of Guam, 48 U.S.C. § 1421a, the Government of Guam is in essence an instrumentality of the federal government. *See United States v. Wheeler,* 435 U.S. 313, 320-21, 98 S.Ct. 1079, 1084-85, 55 L.Ed.2d 303 (1978). Plenary control by Congress over the Guamanian government is illustrated by the provision that Congress may annul any act of Guam's Legislature. 48 U.S.C. § 1423i. Defendants therefore conclude that the negative implications of the commerce clause, designed to preserve congressional authority, cannot limit the Guamanian government, which is a creation of Congress itself. *Wheeler,* 435 U.S. at 321, 98 S.Ct. at 1085, 55 L.Ed.2d 303.

While the reported decisions considering this or similar questions are few in number, they support defendants' position. In *Buscaglia v. Ballester,* 162 F.2d 805 (1st Cir.), *cert. denied,* 332 U.S. 816, 68 S.Ct. 154, 92 L.Ed 393 (1947), the First Circuit held that the commerce clause did not restrict the unincorporated Territory of Puerto Rico because Congress had the power under the territories clause to limit territorial action "even to the extent of annuling local legislation." *Id.* at 807. *Cf. Sea-Land Service, Inc. v. Municipality of San Juan,* 505 F.Supp. 533 (D.P.R. 1980) (decided after Puerto Rico became a commonwealth and holding that although the commerce clause does not apply to Puerto Rico ex proprio vigore, its prohibitive effect is binding on the commonwealth through the territories clause).

In *United States v. Husband R. (Roach),* 453 F.2d 1054 (5th Cir. 1971), *cert. denied,* 406 U.S. 935, 92 S.Ct. 1785, 32 L.Ed.2d 136 (1972), the Fifth Circuit held that the Governor of the Canal Zone was not subject to the limitations imposed on a state legislative body by the commerce clause. *Id.* at 1059-60. The court reasoned that since Congress retains plenary power to regulate the territories, U.S. Const. art. IV, § 3, cl. 2, and to regulate interstate and foreign commerce, U.S. Const. art. I, § 8, cl. 3, the Governor of the Canal Zone as Congress's "delegate," is not subject to the commerce clause limitations. 453 F.2d at 1059-60. Scholarly commentary agrees that constitutional restrictions on the states' regulation of interstate commerce do not extend to unincorporated territories. Leibowitz, *United States Federalism: The States and the Territories,* 28 Am. U.L. Rev. 339 (1979); Leibowitz, *The Applicability of Federal Law to Guam,* 16 Va.J.Int'l.L. 21 (1975); Fuster, *The Origins of the Doctrine of Territorial Incorporation and Its Implications Regarding the Power of the Commonwealth of Puerto Rico to Regulate Interstate Commerce,* 43 Rev.Jur.U.P.R. 259 (1974).

Ninth Circuit precedent is not to the contrary. In *Andersen v. Mullaney,* 191 F.2d 123 (9th Cir. 1951), *aff'd* 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952), we held that while the limitation on state regulation of commerce through the commerce clause did not apply by its own force to the Territory of Alaska, the legislative power granted to the Territorial Legislature was such that the territory should be treated as if it were a state. Alaska at that time was an incorporated territory, well on its way to statehood, and all provisions of the United States Constitution applied. Act of August 24, 1912, ch. 387, § 3, 37 Stat. 512 (codified at 48 U.S.C.A. § 23 (1952).

The distinction between incorporated territories which are thought of as future states, see *Granville-Smith v. Granville-Smith,* 349 U.S. 1, 5, 75 S.Ct. 553, 555-56, 99 L.Ed. 773 (1955) and unincorporated territories, to which only the "essentials" of the Constitution apply, is not new. It goes back to the 1901 series of Supreme Court decisions known as the insular cases: *Downes v. Bidwell,* 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (1901); *Armstrong v. United States,* 182 U.S. 243, 21 S.Ct. 827, 45 L.Ed. 1086 (1901); *Dooley v. United States,* 182 U.S. 222, 21 S.Ct. 762, 45 L.Ed. 1074 (1901); *DeLima v. Bidwell,* 182 U.S. 1, 21 S.Ct. 743, 45 L.Ed. 1041 (1901); *see also Downes v. Bidwell,* 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (White, J., concurring). History and the views of scholars and judges who have focused on the issue all support our conclusion that the limitations the commerce clause places on the powers of states to regulate commerce do not affect the government of the unincorporated Territory of Guam.

This court has never directly addressed the applicability of the commerce clause's negative implications to unincorporated territories like Guam. We have, however, in three cases, assumed without discussion that the commerce clause limits the government of Guam in the same manner that it limits the states.[1] *See Pacific Broadcasting Corp. v. Riddell,* 427 F.2d 519 (9th Cir. 1970) (gross receipts tax not violative of the commerce clause); *Asiatic Trans-Pacific, Inc. v. Maddox,* 371 F.2d 132 (9th Cir. 1967) (gross receipts tax not violative of the commerce clause); *Manila Trading & Supply Co. v. Maddox,* 335 F.2d 150 (9th Cir. 1964) (gross receipts tax violative of the commerce clause).

We do not view these cases as controlling precedent on the applicability of the commerce clause to Guam. In those cases, this court simply assumed that the commerce clause applied, but the issue was never raised or discussed. Such unstated assumptions on non-litigated issues are not precedential holdings binding on future decisions. *See United States v. L.A. Tucker Truck Lines,* 344 U.S. 33, 37-38, 73 S.Ct. 67, 69, 97 L.Ed. 54 (1952) (prior decision is not binding precedent on point neither raised by counsel nor discussed in the opinion of the court in that case); *Webster v. Fall,* 266 U.S. 507, 511, 45 S.Ct. 148, 149, 69 L.Ed. 411 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not be considered as having been so decided as to constitute precedents."); *Matter of Baker,* 693 F.2d 925, 925-26 (9th Cir. 1982) (prior case found not to have established controlling precedent on issue before the court since the question at issue was neither contested not ruled upon in that case); *Sethy v.*

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[1] The district court of Guam has reached inconsistent results on the question of commerce clause applicability. *Cf. Ambros, Inc. v. Maddox,* 203 F.Supp. 934 (D. Guam 1962) (court refused to hold that Congress had not conferred upon Guam the power to impose burdens on commerce by its approval of legislation implicit in its failure to annul). With *Duty Free Shoppers, Ltd, v. Tax Commissioner,* 464 F.Supp. 730 (D. Guam 1979) (because no language exists in the Guam Organic Act which indicates Congressional intent to suspend the commerce clause's operation, the court concluded that Guam is bound by the limitations imposed by the commerce clause).

Alameda County Water District, 545 F.2d 1157, 1159-60 (9th Cir. 1976) (en banc) (accord). We therefore agree with the district court's holding in this case that the commerce clause does not limit the Government of Guam as it limits the governments of the states. The agreement does not violate the commerce clause.

We turn next to the plaintiffs' antitrust claims. The district court dismissed the antitrust claims on several alternative grounds, but we need to reach only the question of immunity. Plaintiffs acknowledge that acts of both state and federal instrumentalities are immune from antitrust liability. *See Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943); *Sea-Land Service, Inc. v. Alaska Railroad,* 659 F.2d 243, 244 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 919, 102 S.Ct. 1274, 71 L.Ed.2d 459 (1982). Plaintiffs, however, try to fit this case within the line of Supreme Court cases holding that municipalities, unlike state goverments and federal instrumentalities, are not immune unless acting pursuant to clearly articulated and affirmatively expressed state policy to displace competition. *See Town of Hallie v. City of Eau Claire,* ____ U.S. ____, ____, 105 S.Ct. 1713, 1717, 25 L.Ed.2d 24 (1985); *Community Communications Co. v. City of Boulder,* 455 U.S. 40, 51, 102 S.Ct. 835, 840-41, 70 L.Ed.2d 810 (1982); *City of Lafayette v. Louisiana Power and Light Co.,* 435 U.S. 389, 413, 98 S.Ct. 1123, 1137, 55 L.Ed.2d 364 (1978); *Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.,* 753 F.2d 790, 792 (9th Cir. 1985). Much of the force of these cases has been prospectively overruled with the enactment of the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 90 Stat. 2750 (1984), effective after this lawsuit was filed.

In *Community Commmunication Co.,* the Supreme Court held that the City of Boulder was not immune from antitrust liability in connection with its policy of limiting competition in cable television. The Court reasoned that the city, a "home rule" municipality with rights of self government superseding the laws of the state, was not entitled to the immunity enjoyed by the state. The grant of home rule was not a "clear articulation and affirmative expression" of state policy regarding cable television regulation. *Community Communication Co.,* 455 U.S. at 54-56, 102 S.Ct. at 842-43, 70 L.Ed.2d 810.

Guam's relationship to the federal government is different from Boulder's relationship to Colorado. As we have seen, the government of Guam is an instrumentality of the federal government over which the federal government exercised plenary control. Congress has granted it far fewer powers of self government than the State of Colorado has granted the City of Boulder. There is no reason why Guam should enjoy less immunity than the federal government itself. *See Jet Courier Services, Inc. v. Federal Reserve Bank of Atlanta,* 713 F.2d 1221, 1228 (6th Cir. 1983); *Sea-Land Service, Inc.,* 659 F.2d at 246-47.

The only remaining contention which plaintiffs pursue on appeal is that because the contract permits delivery by only one company, the contract violates the equal protection clause. Because plaintiffs allege only economic discrimination, we need detemine only whether the contract has a rational relation to legitimate state interests. *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 489, 97 S.Ct. 1898, 1908, 53 L.Ed.2d 513 (1977); *Benson v. Arizona State Board of Dental Examiners,* 673 F.2d 272, 277-78 (9th Cir. 1982).

It is not disputed that the franchise agreement raises revenue for the airport, and revenue production is a legitimate state interest. *See San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 40-41, 93 S.Ct. 1278, 1300-01, 36 L.Ed.2d 16 (1973). Guam's interest in regulating traffic and security at the airport is also implicated. Plaintiffs claim that their deliveries will not in fact create serious traffic or security problems at the airport, but these claims,if true, do not serve to denigrate the legitimacy of the governmental interest in this regard.[2] The concession contract in this case does not deny equal protection.

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[2] Plaintiffs rely on *Park'N Fly of Texas, Inc. v. City of Houston,* 327 F.Supp. 910 (S.D. Tex. 1971). There the court found that a Houston ordinance which permitted only a city "shuttle bus" concessionaire to use favorable positions for loading and unloading passengers from distant parking lots had no basis, "much less a reasonable one." *Id.* at 925. There, however, the distinction between the concessionaire and others with similar vehicles actually created traffic congestion and hindered the ability of the airport to serve its primary obligations to passengers.

AFFIRMED.

HUG, Circuit Judge, concurring:

I concur in the result reached by the majority opinion and with the discussion relative to the antitrust claims. However, I am not fully convinced that the commerce clause does not apply to the Territory of Guam under the authority of *Andersen v. Mullaney,* 191 F.2d 123 (9th Cir. 1951), *aff'd* 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952). I find the distinction between the then Territory of Alaska and the Territory of Guam somewhat tenuous. However, I would not reach that issue because I would hold that the agreement in question places no burden on interstate commerce.

It is clear that the Airport Authority could grant to a concessionaire the exclusive right to sell merchandise in the airport after competitive bidding agreement. No party disputes this. The plaintiffs maintain that the agremeent does more than that; they claim that the agreement deprives them of a transportation facility essential to the shipment of their goods in interstate commerce. In my opinion, this is not the case. Plaintiffs can ship goods by air freight just as any other person can; nothing in the agreement deprives them of the use of the air carrier facility. What is denied to plaintiffs is the use of the airport to complete their sales transaction by delivering the merchandise to the passenger at the airport. The question is, thus, whether the commerce clause requires that the plaintiffs be allowed to use the airport to complete their sales transaction with the customer or whether the Airport Authority can require that delivery be made elsewhere. I would hold that the commerce clause does not prevent the Airport Authority from establishing this requirement. Goods delivered elsewhere to the passenger can be taken aboard by him and the plaintiffs are free to ship by air freight. There is no burden on interstate commerce, there is only a limitation on the use of the airport as a facility to complete the sale by delivery.

Supreme Court, U.S.
FILED
NOV 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-552 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

YOSH SAKAMOTO, PACIFIC GIFT SUPPLY, INC.,
and TOP ENTERPRISES, INC.,
Petitioners,

—against—

DUTY FREE SHOPPERS, LTD., GUAM AIRPORT AUTHORITY,
AND THE GOVERNMENT OF THE UNINCORPORATED
TERRITORY OF GUAM,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS GUAM AIRPORT AUTHORITY AND DUTY FREE SHOPPERS, LTD. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the "dormant" Commerce Clause apply to conduct of the government of the Unincorporated Territory of Guam?

2. Do the federal antitrust laws apply to conduct of the government of the Unincorporated Territory of Guam?

3. Is summary judgment dismissing plaintiffs' Commerce Clause and antitrust claims supported by any of the numerous grounds for dismissal which the Court of Appeals did not reach, but which were recognized by the District Court and the concurring opinion in the Court of Appeals, and/or were raised by defendants below?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-552

YOSH SAKAMOTO, PACIFIC GIFT SUPPLY, INC.,
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DUTY FREE SHOPPERS, LTD., GUAM AIRPORT AUTHORITY,
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BRIEF FOR RESPONDENTS GUAM AIRPORT AUTHORITY AND DUTY FREE SHOPPERS, LTD. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE[1]

1. The Parties.

Plaintiffs/petitioners are Guam merchants. Pet. App. 22.[2] By their admissions, they are profitable enterprises that, like numerous other vendors in Guam, are able effectively to sell and deliver merchandise to their customers at a variety of locations. Pet. App. 13.[3]

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[1] The statutes, rules and regulations, and ordinance cited herein are set out at Res. App 2-15. The constitutional provisions involved in this case appear at Pet. 2.

[2] The opinion of the District Court of Guam is reprinted at Pet. App. 1-21. The opinion of the Court of Appeals is reprinted at Pet. App. 22-29.

Defendant Government of the Unincorporated Territory of Guam ("GovGuam") was created by Congress in the Organic Act of Guam. 48 U.S.C. § 1421a. It is authorized to regulate all matters of local application, and, in particular, to grant franchises, privileges and concessions. 48 U.S.C. § 1423a. These powers are subject to Congress' specific authority to annul the legislation of and otherwise supervise the government of Guam,[4] and to Congress' general plenary power over the Territories. U.S. Const. art. IV, § 3, cl. 2.

Until 1975, GovGuam directly owned and operated the Guam International Air Terminal ("Airport"). Pet. App. 3. In that year, it created its instrumentality defendant Guam Airport Authority ("GAA") to perform that function. Pet. App. 3.[5] The GAA is empowered, *inter alia*, to grant Airport concessions, "manage and operate the Airports in the most efficient manner consistent with the protection of the bondholders," "keep the Airports on a self-sustaining basis" and "do any and all other things necessary to the full and convenient exercise of its power." Guam Gov't Code §§ 62004(e), (h), (m), 62010, 62114. As plaintiffs have admitted, the GAA may "decide who may do business at the airport," and is authorized under local law to prevent all persons from selling or delivering merchandise at the Airport unless they have received written permission from the GAA, which plaintiffs admittedly never have received.[6]

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[3] *See* Yosh Sakamoto and Pacific Gift Supply, Inc.'s Responses to Requests for Admissions, and Top Enterprises, Inc.'s Responses to Requests for Admissions ("Admissions") at Res. App. 18, 19-21, 23-25.

[4] *E.g.*, 48 U.S.C. §§ 1423i (all laws enacted by the government of Guam shall be reported to the federal government; Congress "reserves the power and authority to annul the same"), 1421a (GovGuam "shall be under the general administrative supervision of the Secretary of the Interior"), 1422 (Guam Governor must submit annual report to Secretary of Interior and Congress), 1422d (Inspector General, Department of the Interior has responsibility for maintaining "a satisfactory level of independent audit oversight of the Government of Guam"), 1424-2.

[5] Guam Gov't Code §§ 62001 (the GAA is "a public corporation and autonomous instrumentality of, the government of Guam"), 62004(a), Public Law 13-57 Section 5. *See* Pet. 12 (GAA "an autonomous agency" of GovGuam).

Defendant Duty Free Shoppers, Ltd. ("DFS") is the exclusive merchandise concessionaire at the Airport.

2. The Facts.

In their efforts to finance the operation and improvement of the Airport, GovGuam and subsequently the GAA have long granted exclusive merchandise concession rights at the Airport. Pet. App. 3, 23.[7] It is common practice for airport concessions to be exclusive; such concessions help maximize the revenues of the airport authority, and avoid undue congestion and impairment of airport operations.[8]

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[6] Brief of Plaintiffs-Appellants in the Court of Appeals ("Pl. App. Brief") at 10; Admissions at Res. App. 18, 23. *See* Guam Gov't Code §§ 62004(e), (h), (l), (m), 62013(a); Rules and Regulations of the GAA §§ 3030, 3030.3 ("No person shall carry on any commercial activity at the Air Terminal without the written consent of the Authority"), 3030.5, 3036.4(a), and 3039.5(b), (c).

[7] Deposition of R.M. Stone, dated June 20, 1983 ("Stone Dep."), Record before the District Court ("CR") 80 at 17-26, 29-30 (continuous policy since 1967 of exclusive sale and delivery rights at Airport); Supplementary Affidavit of R.M. Stone ("Stone Supp. Aff."), Excerpt of Record before the Court of Appeals ("ER") at 542-43.

[8] *E.g.*, Affidavit of R.M. Stone, dated May 18, 1983 ("Stone Aff."), ER at 270-72; Stone Dep. CR 80 at 9-12, 26, 39 (exclusive concessions used to maximize revenues at "any number of airports"); Alaska Stat. § 02.15.091(a) (1982) ("[T]he department shall allow the sale and delivery of in-bond merchandise at an international airport only by an exclusive contract."); *Deak-Perera Hawaii v. Dept. of Transportation*, 553 F.Supp. 976 (D. Hawaii 1983), *aff'd*, 745 F.2d 1281 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1756 (1985) (upholding exclusive foreign exchange concession at Honolulu International Airport); *All American Cab Co. v. Metropolitan Knoxville Airport Authority*, 547 F. Supp. 509 (E.D Tenn. 1982), *aff'd*, 723 F.2d 908 (6th Cir. 1983) (upholding exclusive airport concession for limousine services).

GovGuam awarded the initial exclusive Airport merchandise concession in 1967. The Governor of Guam, who was then a direct federal appointee, expressly approved that agreement.[9]

In 1978, the GAA awarded the current concession, after a well publicized competitive bid. Pet. App. 3; Admissions at Res. App. 16, 21. DFS won that bid by guaranteeing payment of over $140 million in concession fees. Pet. App. 4, 23. It is undisputed that if it were not for the exclusive nature of the concession, no firm would have made that high a guarantee. Pet. App. 8.[10]

Based upon DFS' guarantee, in 1979 the GAA (with the approval of the Guam Legislature)[11] sold $43 million of revenue bonds. Pet. App. 4, 9. The GAA used the proceeds of the sale to build a new Airport terminal complex, at a cost in excess of $50 million. Pet. App. 4. That complex was completed in January 1982, the month before this suit was brought. Pet. App. 1, 4.

Plaintiffs did not in 1978 seek to bid for the exclusive concession, or ask the GAA to grant delivery rights on a non-exclusive basis. Pet. App. 4, 14, 20; Admissions at Res. App. 17, 22.[12] Nor has the concession prevented them from doing business effectively. Plaintiffs admit that they are perfectly able to sell and deliver merchandise to their customers and operate profitably without use of the Airport as their place of business. Admissions at Res. App. 18, 19, 21, 23, 25. Customers can and do buy and receive delivery of merchandise from plaintiffs and numerous other vendors at many locations in Guam other than the Airport, and are free to take the goods so delivered through the Airport to their destinations. Pet. 3; Pet. App. 13, 23, 29; Admissions at Res. App. 18, 23. Plaintiffs have been so successful that, by their admissions, they typically charge and receive higher prices for their merchandise than does the fee-paying concessionaire for similar goods. Admissions at Res. App. 18, 23.

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[9] 1967 General Merchandising Concession Lease, ER at 305; Pl. App. Brief at 3. That agreement was assigned to DFS in 1972. Assignment of General Merchandising Concession Lease, ER at 307.

[10] *See* Stone Aff., ER at 270; Stone Dep., CR 80 at 26-28.

[11] *See* Resolution I-S of the Fifteenth Guam Legislature, 1979 (authorizing sale of bonds supported by revenues accruing under concession agreement, and approving amendment to that agreement), ER at 61.

[12] Plaintiffs were not in business in 1967, when the previous concession was awarded. Pet. App. 14.

Thus, plaintiffs' interest in this suit is simply in their desire to offer their customers a single additional convenience, delivery at the Airport. Pet. 3; Pet. App. 13. The outcome of this litigation is of far greater significance to Guam.

As the District Court emphasized, Guam's principal civilian industry, tourism, and its economy generally, depend upon the continued successful operation of the Airport. Pet. App. 10; Stone Aff., ER at 277. The current merchandise concession agreement provides a principal source of revenue for the operation and improvement of the Airport, and for the payments on the GAA's 1979 airport revenue bonds. Pet. App. 8, 20-21; Stone Aff., ER at 277-79. The concession agreement provides that, if the right to deliver merchandise at the Airport ceases to be exclusive for more than sixty days, the guaranteed concession fees will be substantially abated. Pet. App. 21; 1978 Guam Airport Concession Agreement, ER at 320, 332-33. Not only would implementation of this abatement provision impair the GAA's ability to operate, maintain, and improve the Airport, it likely would put the GAA into default under its revenue bonds, and would cripple Guam's ability to enter into future concession agreements or otherwise raise money for public projects. Pet. App. 21; Stone Aff., ER at 278-79. As the District Court recognized, such a result would have a "devastating effect" on Guam's tourism industry and its general economy. Pet. App. 21. *See* Stone Aff., ER at 278-79.

Plaintiffs' suit also threatens the orderly functioning of the Airport. Plaintiffs admit that in order to make their desired deliveries at the Airport, they would require the use of space at the facility. Pl. App. Brief at 46. They also assert that if they have the right to make deliveries at the Airport, so do all other merchants. Admissions at Res. App. 20, 25. Thus, if plaintiffs were to prevail, the ability of the GAA to operate the Airport as an efficient transportation facility would be severely impaired. Stone Aff., ER at 279-80; Stone Dep., CR 80 at 27, 114-15.

3. Prior Proceedings.

In their Amended Complaint, plaintiffs claimed that the Airport concession agreements are invalid under a variety of provisions, including Sections 1, 2 and 3 of the Sherman Act, 15 U.S.C. § 1-3, the Commerce Clause of the Constitution, art. I, § 8, cl. 3, and the Equal Protection Clause, U.S. Const. amend. XIV, cl. 1. Amended Compl., ER at 1-16. After some discovery was taken, plaintiff Pacific Gift Supply, Inc. moved for partial summary judgment, and defendants moved for summary judgment on all of plaintiffs' claims. Pet. App. 2.

The District Court denied plaintiff's motion, and granted defendants summary judgment for numerous reasons, including, *inter alia*: (1) antitrust claims—defendants' conduct is immune from antitrust scrutiny, plaintiffs lack standing (including lack of legal injury, lack of antitrust injury and lack of a causal nexus between the alleged injury and the alleged violation), plaintiffs' claims are barred by the statute of limitations and the doctrine of laches, the concession increases competition and is reasonable as a matter of law, and the exclusivity of the current concession agreement resulted from a unilateral decision by the GAA, not concerted action; (2) Commerce Clause claims—the dormant Commerce Clause does not apply to the government of Guam, and the concession does not burden commerce, but rather promotes the flow of commerce; and (3) Equal Protection claims—the government of Guam did not discriminate against plaintiffs, and its conduct has a rational relationship to legitimate government interests. Pet. App. 6-21.

In the Court of Appeals, plaintiffs asserted only their Commerce Clause, Sherman Act and Equal Protection claims. And, as in the District Court, plaintiffs limited those claims to the exclusive right granted DFS to deliver merchandise at the Airport, conceding the legality of the exclusive right of sale at the Airport. Pl. App. Brief 17; Pet. App. 2, 23, 29.

The Ninth Circuit affirmed the dismissal of each of plaintiffs' remaining claims. It held that the negative implications of the Commerce Clause, designed to protect Congressional authority against the actions of the sovereign states, do not apply to the government of Guam, which is a creation of Congress and subject to its plenary control. Pet. App. 23-27. The concurring opinion declined to reach this ground for dismissal because it found that the challenged conduct does not burden commerce, but only requires other vendors to complete their sales transactions by delivery at a location other than the Airport. Pet. App. 29.

The Court of Appeals further held that, since the government of Guam was created by Congress and is subject to its control, its conduct, like that of Congress, is immune from antitrust scrutiny. Pet. App. 27-28. Finally, the court rejected plaintiffs' equal protection contentions because the concession agreements have a rational relation to legitimate government interests. Pet. App. 28.

In their petition for a writ of *certiorari*, plaintiffs seek review only of the dismissal of their remaining Commerce Clause and antitrust claims. Pet. i.

SUMMARY OF ARGUMENT

Plaintiffs are unable to present any issue that warrants review by the Court.

1. The decision of the Court of Appeals was correct, and plaintiffs have identified no conflicting decision in this Court or any Court of Appeals.

a. Plaintiffs' Commerce Clause argument fails on its own touchstone—Congressional intent. All of the Courts of Appeals that have decided the issue have agreed, and plaintiffs apparently concede, that the restrictions imposed on the sovereign states by the "dormant" Commerce Clause do not apply of their own force to the government of a Territory. And, unlike its application of the entire Constitution to the former incorporated Territories of Alaska and Hawaii, Congress has chosen to apply only certain Constitutional provisions to the government of Guam, not including the dormant Commerce Clause. Indeed, although the policy of exclusive Airport concessions has been in effect continuously since 1967, when it was approved by a direct federal appointee, Congress has taken no step to change it. Far from impinging upon Congressional authority, the decision of the Court of Appeals therefore directly implements Congressional intent.

b. Consistent with an unbroken string of Court of Appeals decisions, plaintiffs have acknowledged that Congress did not intend to subject itself or its instrumentalities to the civil and criminal sanctions of the antitrust laws. And, unlike the municipalities to which plaintiffs liken it, the government of Guam is a creation of Congress, intended to perform functions Congress otherwise would have to perform itself, and directly limited by Congressional authority. In the Local Government Antitrust Act of 1984, Congress extended the antitrust immunity of municipalities. Instead of treating the Territories as municipalities, which still do not have unlimited antitrust immunity, it categorized them in that statute with the States, the conduct of which is unqualifiedly immune from antitrust scrutiny. In any event, even if the government of Guam were akin to a municipality for antitrust immunity purposes, the conduct challenged here would be immune as more than reasonably foreseeable from the authority granted in the Guam Organic Act.

2. In addition to consideration of the two issues reached by the Court of Appeals, further review of this case would involve the numerous other defenses that warrant dismissal of plaintiffs' claims, including the alternative grounds for dismissal found by the District Court and the concurring opinion in the Court of Appeals. Plaintiffs' briefs have not even attempted to refute certain of those defenses. Based in part on plaintiffs' admissions and other uncontroverted evidence in the record, those other grounds counsel strongly against further review.

REASONS FOR DENYING THE WRIT

I. PLAINTIFFS HAVE OFFERED NO REASON WARRANTING REVIEW OF THE HOLDINGS OF THE COURT OF APPEALS

A. The Dormant Commerce Clause Does Not Apply to the Government of Guam

As the District Court observed, regulating the commercial use of the island's sole civilian airport, and raising funds for its operation and improvement, are crucial for the economic well-being of the people of Guam. Pet. App. 10, 19, 21.[13] Plaintiffs do not assert that the exclusive Airport concession—which provides such important local benefits—violates the

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[13] *See* Admissions at Res. App. 16, 17, 21, 23; Stone Aff., ER at 277-78; *Deak Perera Hawaii, Inc. v. Dept. of Transportation*, 553 F. Supp. at 978 (recognizing importance of airport to island where tourism is the main industry).

Guam Organic Act or Guam law. To the contrary, they have admitted that the GAA has authority under local law "to decide who may do business at the airport," and to bar unauthorized persons from selling or delivering merchandise there. Pl. App. Brief at 10; Admissions at Res. App. 18, 23.[14]

Plaintiffs contend, however, that the Airport concession is prohibited by the Commerce Clause.[15] Without even reaching all of the available grounds, the Court of Appeals correctly rejected this claim.

All of the Courts of Appeals that have decided the issue have concluded, and plaintiffs appear to acknowledge, (Pet. at 8), that the "dormant" Commerce Clause does not apply of its own force to the government of a Territory.[16] The dormant Commerce Clause doctrine was created by the Court to ensure that the states do not, by the exercise of their own sovereign powers over local affairs, impinge upon Congress' authority to regulate interstate and foreign commerce, or unduly interfere with the free flow of such commerce. *E.g.*, *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 766-69 (1945). A Territorial government has no power except that granted it by Congress.[17] If Congress disapproves of the way in which the power it has delegated to a Territory has been used, Congress can, as plaintiffs concede, directly curtail the Territory's power or change its conduct (subject, of course, to other legal requirements, such as due process). *E.g.*, U.S. Const. art. IV § 3 cl. 2; 48 U.S.C. § 1423i; Pet. 4.

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[14] *See* Rules and Regulations of the GAA § 3030.3 (prohibiting commercial activity at Airport without written permission of GAA). Compare Hawaii Administrative Rule § 19-14-3(i) (same); Los Angeles Admin. Code, Art. 4, Ch. 1, Div. 23, § 23.27(b) (same).

[15] Pet. i, 4-10; Amended Compl. ¶ 45, ER at 13; Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment, ER at 100-103; Reply of Plaintiffs to Defendants' Motion for Summary Judgment, ER at 388; Plaintiffs' Reply Memorandum, ER at 573-82; Pl. App. Brief at 8-11; Pl. App. Reply Brief at 2-3.

[16] *U.S. v. Husband R. (Roach)*, 453 F.2d 1054, 1059 (5th Cir. 1971), *cert. denied*, 406 U.S. 935 (1972) ("Congress being given extensive power [under the Commerce Clause and the Territories Clause], the Governor as its delegate is not subject to the limitations imposed upon a state legislative body by the commerce clause"); *Anderson v. Mullaney*, 191 F.2d 123, 128 (9th Cir. 1951), *aff'd*, 342 U.S. 415 (1952) (Commerce Clause does not, *ex proprio vigore*, limit a Territorial Legislature); *Buscaglia v. Ballester*, 162 F.2d 805, 807 (1st Cir.), *cert. denied*, 332 U.S. 816 (1947) (The Commerce Clause "can have no consequential effect of limiting territorial action since Congress already has the power under Art. IV, Section 3, Cl. 2, supra, to limit such action to any extent it chooses, even to the extent of annulling local legislation."). Far from abandoning its decision in *Buscaglia* (*see* Pet. at 9), the First Circuit in *Caribtow Corp. v. Occupational Safety & Health Review Comm.*, 493 F.2d 1064, 1068 n.11 (1st Cir.), *cert. denied*, 419 U.S. 830 (1974) had "no occasion here to reconsider that opinion in the light of intervening events."

The dormant Commerce Clause therefore should apply to a territorial government only if Congress applies it. In the case of Guam, Congress has decided not to do so.

The Guam Organic Act confers authority upon the government of Guam, and lists the restrictions that Congress imposed on that authority, including certain Constitutional limitations. *See* [illegible] U.S.C. § 1421b. These limitations do not include the dormant Commerce Clause. Under the maxim *expressio unius est exclusio alterius*, it is clear that Congress, retaining plenary power over Guam, did not intend to apply that provision to the government of Guam. *See, e.g.*, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978) (by listing exemptions in statute, Congress presumed to intend to exclude any other exemption).

This conclusion is buttressed by the 1968 amendments to the Guam Organic Act, in which Congress imposed certain additional Constitutional limitations on the government of Guam to the extent they previously had not been applied. 48 U.S.C. § 1421b(u). Congress did not include the Commerce Clause in this list, even though six years before the District Court of

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[17] Pl. App. Brief at 3; *United States v. Wheeler*, 435 U.S. 313, 321 (1978) (a territorial government acts as "an agency of the federal government," and is "entirely the creation of Congress"); *United States v. Kagama*, 118 U.S. 375, 379-80 (1886) ("territorial governments owe all their powers" to Congress).

Guam had refused to apply the dormant Commerce Clause to the government of Guam,[18] and both the First and Ninth Circuits had by 1968 decided that the dormant Commerce Clause does not apply of its own force to the governments of Territories. *Anderson v. Mullaney, supra*; *Buscaglia v. Ballester, supra*.

Indeed, the policy of exclusive Airport concessions was begun in 1967 with the express approval of the Governor of Guam, who was a direct federal appointee.[19] And Congress has taken no step to change that policy. *See Ranes v. Office Employees International Union*, 317 F.2d 915, 917-18 (7th Cir. 1963) (Congress presumed to be aware of practices of an entity subject to its regulation).[20]

Plaintiffs' principal citation, *Anderson* v. *Mullaney*, 191 F.2d 123 (9th Cir. 1951), *aff'd*, 342 U.S. 415 (1952), relating to the former Territory of Alaska, simply confirms that Congress did not intend to apply the dormant Commerce Clause to Guam. In the Alaska Organic Act, Congress provided that "The Constitution of the United States . . . shall have the same force and effect within the said Territory as elsewhere in the United States." 48 U.S.C. § 23. That provision is in marked contrast to the approach later taken by Congress in the Guam Organic Act.[21] And, it was in light of that provision that the Court invalidated the challenged Alaska law (under the Privileges and Immunities Clause of Art. IV, § 2 of the Constitution).[22] *See also Duncan v. Kahanamoku*, 327 U.S. 304, 317 (1946) (in light of Hawaii Organic Act provision "that the Constitution . . . shall have the same force and effect within the said Territory as elsewhere in the United States . . . ," it "becomes clear that Congress did not intend the Constitution to have a limited application to Hawaii").

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[18] *Ambros, Inc. v. Maddox*, 203 F. Supp. 934, 937 (D. Guam 1962).

[19] *See* 1967 General Merchandising Concession Lease, ER at 305; Pet. App. 3; Stone Aff., ER at 268-69; Stone Supp. Aff., ER at 542-43; Pl. App. Brief at 3.

[20] Congress' plain intent in the Guam Organic Act not to apply the dormant Commerce Clause to the government of Guam makes completely inapplicable the decisions cited by plaintiffs (Pet. at 8) construing the Guam and Virgin Islands Organic Acts with regard to other issues.

[21] *See* S. Rep. No. 2109, 81st Cong., 2d Sess. (explaining Guam Organic Act) (1950), *reprinted in* 1950 U.S. Code Cong. & Ad. News 2840, 2854 ("As an unincorporated Territory, Guam, like Puerto Rico and the Virgin Islands, is appurtenant to the United States and belongs to the United States but is not a part of the United States, as distinguished from Alaska and Hawaii, which are incorporated Terri-

Plaintiffs also cite a variety of other decisions from the Ninth Circuit, and two Third Circuit decisions. Pet. 10. None of those cases decided the question of the applicability of the dormant Commerce Clause to a territorial government; they just assumed it. As the Court of Appeals stated, Pet. App. 26, such assumptions do not constitute precedent. *E.g.*, *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952); *Webster* v. *Fall*, 266 U.S. 507, 511 (1925).

Nor, in any event, should any alleged conflict between the decision below and any other decision of the Ninth Circuit provide a basis for review by this Court. The correct procedure for resolving a perceived difference between panels within a circuit is to request a rehearing *en banc*. Plaintiffs did not do so. Pet. 1.

Thus, plaintiffs have failed to adduce any basis for further review of their Commerce Clause claims.

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tories. Unincorporated areas are not integral parts of the United States and no promise of statehood or a status approaching statehood is held out to them.").

[22] Unlike its omission of the Commerce Clause, Congress has applied the Privileges and Immunities Clause of Art. IV, § 2, to the government of Guam. 48 U.S.C. § 1421b(u).

B. The Challenged Conduct Is Immune from Scrutiny Under the Federal Antitrust Laws.

All of the Courts of Appeals that have addressed the issue have agreed that the conduct of federal agencies and instrumentalities is immune from antitrust scrutiny.[23] Plaintiffs acknowlege this proposition, Pet. App. 27, and concede that the conduct challenged here is conduct of the government of Guam. Pet. App. 6. They argue, however, that the government of Guam should be treated as a muncipality, not as a federal instrumentality, for antitrust purposes.

Plaintiffs base this position principally on *United States v. Wheeler,* 435 U.S. 313 (1978). That decision does not equate Territories with municipalities. It simply explains that, as municipalities are creatures of state governments, territories are creatures of the federal government, with no inherent sovereign power. It is precisely because a Territory is created by Congress to perform functions for Congress, and is subject to Congress' plenary control, that it is different from a municipality, and its conduct should share Congress' antitrust immunity.

Plaintiffs also cite *Hecht v. Pro-Football, Inc.* 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). As the D.C. Circuit has subsequently noted, the decision in *Hecht* denied immunity to a corporation that was in the nature of "a private venture."[24] The government of Guam is a governmental entity acting in the public interest. Pet. App. 7-8.

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[23] *Jet Courier Services, Inc. v. Federal Reserve Bank of Atlanta*, 713 F.2d 1221, 1228 (6th Cir. 1983) (Federal Reserve Banks immune from Sherman Act, even though they are partially privately-owned, because they were "created by Congress to perform important governmental functions"); *Feldman v. Gardner,* 661 F.2d 1295, 1307-08 (D.C. Cir. 1981), *vacated on other grounds sub nom. District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) (acts of a federal instrumentality are immune from antitrust scrutiny); *Sea-Land Service, Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982) (railroad owned and operated by United States may not be sued under the Sherman Act because "Congress did not place the United States or its instrumentalities under the governance of the Sherman Act"); *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 632 F.2d 680, 692 (7th Cir. 1980) (Army and Air Force Exchange Service immune from Robinson-Patman Act).

It does not matter that the Governor and Legislature of Guam are popularly elected, rather than appointed directly by the federal government as was the Governor before 1968. Pet. 12; Pl. App. Brief at 3. By granting the people of Guam somewhat more autonomy, Congress surely did not intend to deny their government's actions antitrust immunity, and subject it to possible civil and criminal sanctions.

This conclusion is supported by the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34, 35. Congress enacted that law to expand the antitrust immunity of "local governments" in damages cases. Rather than treating the Territories as local governments, which still do not have unlimited antitrust immunity, Congress in that statute included the territories within the definition of a "State," the conduct of which long has been held to have unqualified antitrust immunity. 15 U.S.C. §§ 15g(2), 34. *See Parker v. Brown*, 317 U.S. 341, 352 (1943). Far from being an incursion on the authority of Congress to regulate the Territories (*see* Pet. 12), the decision of the Court of Appeals implements Congress' exercise of that authority.

In any event, even under plaintiffs' position, the challenged conduct is immune from antitrust scrutiny. The conduct of a municipality is immune from the federal antitrust laws if it is a "foreseeable result" of authorizing state legislation. *Town of Hallie v. City of Eau Claire*, 105 S.Ct. 1713, 1718 (1985). The Guam Organic Act empowers the Guam Legislature to impose "license fees, and royalties for franchises, privileges, and concessions . . . for purposes of the government of Guam."

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[24] *Feldman v. Gardner*, 661 F.2d at 1307. *See also Sea-Land Service, Inc. v. Alaska R.R.*, 659 F.2d at 247 ("*Hecht* does not supply analysis appropriate in a case in which the activities of a United States instrumentality are at issue"); *Sabin v. Berglund*, 585 F.2d 955, 960 (10th Cir. 1978) (defendant in *Hecht* not a federal agency).

48 U.S.C. § 1423a. That the government of Guam might grant exclusive licenses, "franchises, privileges, and concessions" in return for "license fees, and royalties" is certainly a foreseeable consequence of the statute. *See* Admissions at Res. App. 18, 23 (plaintiffs conceding that the GAA is empowered to decide who may do business at the Airport).[25] Indeed, the Guam policy of granting exclusive Airport concession rights has been in effect continuously since 1967, when it was initiated with the approval of a direct federal appointee. Pet. App. 8-9; Stone Dep., CR 80 at 17-26, 30; 1967 General Merchandising Concession Lease, ER at 305; Pl. App. Brief at 3.[26]

Accordingly, the challenged conduct is immune from antitrust scrutiny.

II. ON THE RECORD IN THIS CASE, THERE ARE NUMEROUS OTHER GROUNDS TO SUPPORT DISMISSAL OF PLAINTIFFS' CLAIMS

In defending the judgment of the Court of Appeals, defendants are entitled to assert any ground for dismissal available in the law and the record. *Thigpen v. Roberts*, 104 S. Ct. 2916, 2918 (1984); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). As the decision in the District Court and the concurring opinion in the Court of Appeals demonstrate, numerous such grounds exist here in addition to those reached by the Court of Appeals.

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[25] *See also, e.g., Town of Hallie v. City of Eau Claire*, 105 S. Ct. at 1718 (statute authorizing city to provide sewage services and decide which areas should be serviced clearly contemplated that city may engage in anti-competitive conduct); *L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517, 522 (8th Cir. 1985) (exclusive solid waste disposal contract a foreseeable consequence of statute authorizing municipality to enter into agreements to provide solid waste management and disposal).

[26] Plaintiffs do not deny that the GAA has actively supervised the operations of the concessionaire, *see* Stone Aff., ER at 279; 1978 Guam Airport Concession Agreement, ER 327-330; Stone Dep., CR 80 at 112-113, and have not contested the conclusion that if the challenged conduct is immune, DFS shares in the immunity. *See Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721 (1985).

The District Court dismissed plaintiffs' antitrust claims for the following reasons in addition to federal instrumentality immunity:

> (1) Any efforts by DFS to influence the GAA or GovGuam to grant an exclusive concession are immune under the *Noerr-Pennington*[27] doctrine. Pet. App. 10-11.
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> (2) Plaintiffs lack standing because: they have no legal right to conduct their business at the Airport; any alleged injury to plaintiffs resulted from an increase, not a decrease, in competition; and plaintiffs' failure to secure Airport delivery privileges resulted from their own failure or inability to seek, qualify for, or obtain the rights offered. Pet. App. 11-14.
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> (3) Because the GAA's refusal to allow plaintiffs to make deliveries at the Airport was final more than four years before this suit was filed, plaintiffs' claims are barred by the statute of limitations. Pet. App. 16-18.
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> (4) Because plaintiffs waited to sue until after the current concession had been awarded, after DFS' guarantee had been used to sell airport revenue bonds, after the money so raised had been spent to construct the new terminal complex and after the new complex had been completed, plaintiffs' claims are barred by the doctrine of laches. Pet. App. 18.
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> (5) Because the Airport concession allows the provision of services that otherwise would not be available, facilitates the operation of the Airport and benefits tourism

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[27] *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

> and the economy of Guam, and because the current concession was granted pursuant to an open and fair competitive bid, defendants' conduct was reasonable as a matter of law. Pet. App. 14-15.
>
> (6) The exclusivity of the current concession resulted from a unilateral decision by the GAA to grant exclusive rights, not from concerted action. Pet. App. 11.

In addition to recognizing the inapplicability of the dormant Commerce Clause to the government of Guam, the District Court dismissed plaintiffs' Commerce Clause claims on the grounds, *inter alia*, that because plaintiffs have no right to do business at the Airport, and the concession greatly benefits the Airport and the Guam tourism industry, the concession does not burden commerce and, indeed, promotes it. Pet. App. 19. In his concurring opinion, Circuit Judge Hug found that "[t]here is no burden on interstate commerce, there is only a limitation on the use of the airport as a facility to complete the sale by delivery." Pet. App. 29.

The GAA and DFS have also raised other defenses that have not heretofore been reached: They contend that plaintiffs' Commerce Clause claims are barred by the doctrine of laches, and are legally deficient because plaintiffs have suffered no legal injury and have shown no causal nexus between any alleged injury and the purported violation; the GAA claims sovereign immunity; and DFS contends that there can be no cause of action against it for the alleged violation of plaintiffs' constitutional rights.

Plaintiffs' briefs have never addressed defendants' laches defenses. Nor have they contested the defenses that the current concession is reasonable as a matter of law because it was granted by a competitive bidding process, and that plaintffs lack standing because of their failure in 1978 to seek the concession or non-exclusive delivery privileges.

If it decided to review this case, the Court would be confronted with all the grounds for dismissal discussed in this section, in addition to those discussed above.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Rule 28.1 Statement of Respondent Duty Free Shoppers, Ltd.

DFS Group Limited
Classic Jewellers International Limited
Classic Leather Ltd.
Le Classique (Private) Limited
Duty Free Shoppers K.K.
Duty Free Shoppers Group Limited
International Credit Systems Ltd.
Le Classique Duty Free Shoppers Limited
Duty Free Shoppers Palau
CBOS Limited
Duty Free Shoppers Limited
Duty Free Shoppers N.V.
Clarisse Limited
Preferred Products Limited
CBOS N.V.
DFS Marketing Pty. Ltd.
DFS (1973) Limited
Preferred Products (Private) Ltd.
Commonwealth Investment Company, Inc.
Aero Shops, Inc.
RHC Luggage, Inc.
Duty Free Shoppers LAX, Inc.
Ukana Limited
Hawaiian King Candies Limited
Duty Free Shoppers JFK, Inc.
DFS North America, N.V.
Duty Free Shoppers (Private) Limited
Le Classique (Macau) Limited
Le Classique Limited
International Gift Shops, Inc.
Amana Corporation
42269 Ontario Limited
DFS Properties, Inc.
Marine Tobacco Company, Inc.
DFS Group Limited (Panama)
DFS Group (C.N.M.I.)

APPENDIX B

Statutes, Rules and Regulations, and Ordinance

ORGANIC ACT OF GUAM,
48 U.S.C. §§ 1421-1428 (as amended) (Excerpts)

§ 1421a. Unincorporated territory; capital; powers of government; suits against government; type of government; supervision

Guam is declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this chapter, shall have power to sue by such name, and, with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers. The government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government in all matters not the program responsibility of another Federal department or agency, shall be under the general administrative supervision of the Secretary of the Interior.

§ 1421b. Bill of rights

(a) No law shall be enacted in Guam respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of their grievances.

(b) No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

(c) The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant for arrest or search shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

(d) No person shall be subject for the same offense to be twice put in jeopardy of punishment; nor shall he be compelled in any criminal case to be a witness against himself.

(e) No person shall be deprived of life, liberty, or property without due process of law.

(f) Private property shall not be taken for public use without just compensation.

(g) In all criminal prosecutions the accused shall have the right to a speedy and public trial; to be informed of the nature and cause of the accusation and to have a copy thereof; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

(h) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(i) Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in Guam.

(j) No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted.

(k) No person shall be imprisoned for debt.

(l) The privilege of the writ of habeas corpus shall not be suspended, unless, when in cases of rebellion or invasion or imminent danger thereof, the public safety shall require it.

(m) No qualification with respect to property, income, political opinion, or any other matter apart from citizenship, civil capacity, and residence shall be imposed upon any voter.

(n) No discrimination shall be made in Guam against any person on account of race, language, or religion, nor shall the equal protection of the laws be denied.

(o) No person shall be convicted of treason against the United States unless on the testimony of two witnesses to the same overt act, or on confession in open court.

(p) No public money or property shall ever be appropriated, supplied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or association, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary as such.

(q) The employment of children under the age of fourteen years in any occupation injurious to health or morals or hazardous to life or limb is hereby prohibited.

(r) There shall be compulsory education for all children, between the ages of six and sixteen years.

(s) No religious test shall ever be required as a qualification to any office or public trust under the government of Guam.

(t) No person who advocates, or who aids or belongs to any party, organization, or association which advocates, the overthrow by force or violence of the government of Guam or of the United States shall be qualified to hold any public office of trust or profit under the government of Guam. (Aug. 1, 1950, c. 512, § 5, 64 Stat. 385.)

(u) The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

All laws enacted by Congress with respect to Guam and all laws enacted by the territorial legislature of Guam which are inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency.

(As amended Sept. 11, 1968, Pub.L. 90-497, § 10, 82 Stat. 847.)

§ 1422. Governor and Lieutenant Governor; term of office; qualifications; powers and duties; annual report to Congress

* * * *

The Governor shall prepare, publish, and submit to the Congress and the Secretary of the Interior a comprehensive annual financial report in conformance with the Standards of the National Council on Governmental Accounting within one hundred and twenty days after the close of the fiscal year. The comprehensive annual financial report shall include statistical data as set forth in the standards of the National Council on Governmental Accounting relating to the physical, economic, social, and political characteristics of the government, and any other information required by the Congress. The Governor shall transmit the comprehensive annual financial report to the Inspector General of the Department of the Interior who shall audit and report his findings to the Congress. The Governor shall also make such other reports at such other times as may be required by the Congress or under applicable Federal law. He shall also submit to the Congress, the Secretary of the Interior, and the cognizant Federal auditors a written statement of actions taken or contemplated on Federal audit recommendations within sixty days after the issuance date of the audit report.

* * * *

§ 1422d. Transfer of functions from government comptroller for Guam to Inspector General, Department of the Interior

(a) Functions, powers and duties transferred

The following functions, powers, and duties heretofore vested in the government comptroller for Guam are hereby transferred to the Inspector General, Department of the Interior, for the purpose of establishing an organization which will maintain a satisfactory level of independent audit oversight of the government of Guam:

(1) The authority to audit all accounts pertaining to the revenue and receipts of the government of Guam, and of funds derived from bond issues, and the authority to audit, in accordance with law and administrative regulations, all expenditures of funds and property pertaining to the government of Guam including those pertaining to trust funds held by the government of Guam.

(2) The authority to report to the Secretary of the Interior and the Governor of Guam all failures to collect amounts due the government, and expenditures of funds or uses of property which are irregular or not pursuant to law.

(b) Scope of authority transferred

The authority granted in paragraph (a) of this section shall extend to all activities of the government of Guam, and shall be in addition to the authority conferred upon the Inspector General by the Inspector General Act of 1978 (92 Stat. 1101), as amended.

* * * *

§ 1423a. Power of Legislature; limitation on indebtedness of Guam; bond issues; guarantees for purchase by Federal Financing Bank of Guam Power Authority bonds or other obligations; interest rates; default

The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam. Taxes and assessments on property, internal revenues, sales, license fees, and royalties for franchises, privileges, and concessions may be imposed for purposes of the government of Guam as may be uniformly provided by the Legislature of Guam, and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by the government of Guam . . . .

* * * *

§ 1423i. Approval of bills

Every bill passed by the legislature shall, before it becomes a law, be entered upon the journal and presented to the Governor. . . . All laws enacted by the legislature shall be reported by the Governor to the head of the department or agency designated by the President under section 1421a of this title. The Congress of the United States reserves the power and authority to annul the same.

§ 1424-2. Relations between courts; United States Court of Appeals for the Ninth Circuit; review of appellate court decisions; reports to Congress; rules

* * * *

[F]or the first fifteen years following the establishment of the appellate court authorized by section 1424-1 of this title, the United States Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of certiorari all final decisions of the highest court of Guam from which a decision could be had. The Judicial Council of the Ninth Circuit shall submit reports to the Committee on Energy and Natural Resources of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives at intervals of five years following the establishment of such appellate court as to whether it has developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States from all such final decisions. The United States Court of Appeals for the Ninth Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this subsection.

(Added Oct. 5, 1984, Pub. L. 98-454, 98 Stat. 1742.)

ALASKA ORGANIC ACT,
48 U.S.C. § 23 (repealed) (Excerpt)

§ 23. Constitution and laws of the United States extended

The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States.

* * * *

SHERMAN ACT
15 U.S.C. §§ 1, 2, 3 (Excerpts)

§ 1. Trusts, etc.; in restraint of trade illegal; exception of resale price agreement; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

* * * *

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor.

* * * *

§ 3. Trusts in Territories or District of Columbia illegal; combination a misdemeanor

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any

State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * *

LOCAL GOVERNMENT ANTITRUST ACT OF 1984,
15 U.S.C. §§ 34, 35

§ 34. Definitions applicable to Local Government Antitrust Act of 1984 provisions

For purposes of this section and sections 35 and 36 of this title—

(1) the term "local government" means—

(A) a city, county, parish, town, township, village, or any other general function governmental unit established by State law,

* * * *

(3) the term "State" has the meaning given it in section 15g(2) of this title.

§ 35. Recovery of damages, etc., for antitrust violations from any local government, or official or employee thereof acting in an official capacity

(a) Prohibition in general

No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a, or 15c of this title from any local government, or official or employee thereof acting in an official capacity.

15 U.S.C. § 15g(2)

§ 15g. Definitions

(2) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

PUBLIC LAW 13-57, GUAM GOV'T CODE
§§ 62000-62124, AND SECTIONS 1-5 (Excerpts)

Enacted: September 26, 1975

AN ACT TO REPEAL CHAPTER IV OF TITLE XLIV OF THE GOVERNMENT CODE AND TO ADD A NEW TITLE LXVI TO THE GOVERNMENT CODE TO CREATE A GUAM AIRPORT AUTHORITY AND AUTHORIZE THE ISSUANCE OF REVENUE BONDS BY SAID AUTHORITY.

§ 62001. There is within, and a public corporation and autonomous instrumentality of, the government of Guam called the Guam Airport Authority.

§ 62004. The Authority shall have and exercise each and all of the following powers:

(a) Acquire, construct, reconstruct, purchase, better, extend, improve, operate and maintain airports and related facilities owned or used by Guam for civil aviation purposes.

* * * *

(e) To impose, prescribe, revise and collect fees, rates, rentals, landing fees and charges for the use and services of, and the facilities and commodities furnished by the airports operated by the Authority and to charge and collect any fees permitted by the Joint Use Agreement, and to pay charges and costs imposed by said Agreement upon Guam.

* * * *

(h) To make and enter into contracts, leases, concession agreements and permits and to execute all instruments necessary or convenient in the exercise of its powers, including without limitation, the purchase of liability and casualty insurance for airport purposes, adopt a seal and sue or be sued in its own corporate name.

* * * *

(l) To adopt such rules and regulations, pursuant to the Administrative Adjudication Act, as may be necessary for the exercise of powers and performance of the duties conferred or imposed upon the Authority or the Board.

(m) To do any and all other things necessary to the full and convenient exercise of the above powers.

* * * *

§ 62013. Penalties. (a) Any person who violates any provision of this Chapter, or any valid rule or regulation promulgated under this Chapter, or any valid Executive Order issued with respect to the operations of the Authority, or who refuses or neglects to comply with any lawful order given by the Executive Manager or his delegate concerning the operation of the airports under the control of the Authority, is punishable by a fine of not to exceed One Thousand Dollars ($1,000.00), or by imprisonment not to exceed six (6) months, or both.

* * * *

§ 62010. It is declared to be the policy of Guam that the Authority in acquiring, constructing, reconstructing, purchasing, bettering, extending or improving the Airports pursuant to this Title, shall manage and operate the Airports in the most efficient manner consistent with the protection of the bondholders.

§ 62114. The Authority shall impose, prescribe and collect rates, rentals, fees or charges for the use and services of and the facilities and commodities furnished by the Airports, including landing fees as permitted, and shall revise such rates, rentals, fees, charges and landing fees from time to time whenever necessary to keep the Airports on a self-sustaining basis. The rates, rentals, fees, charges and landing fees imposed and prescribed shall produce revenues which will be at least sufficient:

(a) To make the required payments of the principal of and interest on all bonds issued for the Airports;

(b) To pay the cost of operation, maintenance and repair of the Airports, including reserves therefor;

(c) To carry out the covenants of the bond resolution or resolutions authorizing the issuance of the bond; and

(d) To repay without interest to the government of Guam for advances hereafter made for or on account of the Airports, including the allocable portions of principal and interest on rehabilitation loans made for or on account of the Airports, as disclosed by historic annual financial reports of relevant operations.

Section 5. Within two (2) weeks after the confirmation of the Board of Directors, the Director of Commerce shall transfer to the Authority:

* * * *

(c) All working capital, cash, accounts payable and receivable, deposits, advances, payable and receivable, all books, records and documents, and all other rights, obligations, assets, liabilities, agreements, contracts, leases, concessions and all other rights, obligations and privileges pertaining to the operation of the Guam International Air Terminal and other matters and concerns of the Department of Commerce which are to be assumed by the Authority, including the assets in the Guam International Air Terminal Fund.

ALASKA STAT. § 02.15.091

Alaska Stat. § 02.15.091

Sec. 02.15.091. Sale and delivery of in-bond merchandise at international airports. (a) As provided by (b) and (c) of this section, the department shall allow the sale and delivery of in-bond merchandise at an international airport only by an exclusive contract.

* * * *

RULES AND REGULATIONS OF THE GUAM AIRPORT AUTHORITY

Title 4, COMMERCE (Orig. Pub. 2-15-75) (Rev. 6-30-82) (Excerpts)

Part A. General

§ *3030. Authority.*

The following rules and regulations are hereby promulgated by the Board of Directors of the Guam Airport Authority in accordance with Public Law 13-57 and shall have the force and effect of law.

§ *3030.3. Commercial Activity.*

No person shall carry on any commercial activity at the Air Terminal without the written consent of the Authority.

§ *3030.5. Storage of Cargo.*

Unless otherwise provided by a lease or other contractual agreement, no person shall use any area of the Air Terminal for storage of cargo or any other property without permission of the Manager. If, notwithstanding the above prohibition, a person uses such areas for storage, as aforesaid, without first obtaining such permission, then the Manager shall have authority to order the cargo or any other property removed or to cause the same to be removed and stored, at the expense of the owner or consignee thereof, without responsibility or liability for damages arising therefrom.

§ *3036.4. Selling, Soliciting and Entertaining.*

No person, except those persons or firms authorized by written contract to do so or any other persons with the written permission of the Manager for specific occasions, shall in or upon any area, platform stairway station, waiting room or any other appurtenance of the Air Terminal:

(a) Sell, or offer for sale, any article or merchandise;

* * * *

§ *3039.5. Penalties.*

* * * *

(b) Persons violating these rules and regulations, other than those referred to in (a) above, may be ejected from the airport premises by the Manager or his delegate. In addition, such persons are subject to prosecution under the Penal Code of Guam if the violation of these rules and regulations is also a violation of the Penal Code with fines not to exceed One Thousand Dollars ($1,000.00), per incident.

(c) Personal property or other goods placed on the Air Terminal premises in violation of the rules and regulations may be removed from the place where found by the Manager or his delegate kept by him until reclaimed by the owners, or if not claimed, then disposed of by the Manager. Such articles may not be claimed except upon the payment of a fee, to be determined by the Manager, for the cost of storage and removal of the property in question.

HAWAII ADMINISTRATIVE RULE § 19-14-3(i)

(i) Commercial Activity. No person shall engage in any business or commercial activity, for a fee or gratuity, in or at a public airport without the permission of the director.

LOS ANGELES CITY ADMINISTRATIVE CODE, Art. 4, Ch.1, Div. 23, § 23.27(b)

No person shall engage in any business or commercial activity of any kind whatsoever on the Airport without first having applied for and obtained the appropriate license, lease or permit therefor.

APPENDIX C

Admissions

Responses of Sakamoto and Pacific Gift Supply, Inc., and Responses of Top Enterprises, Inc., to Requests for Admissions, March 4, 1983 (CR46) (Excerpts)

1. *Responses of Sakamoto and Pacific Gift Supply, Inc.*

8. Fostering the general welfare of the people of Guam is a lawful goal and mandate of the GAA.
A. Admit

9. The GAA made the 1978 Concession available to all interested and qualified parties through an open competitive procedure.
A. Admit

12. Prior to awarding the 1978 Concession, the GAA published formal notice in a variety of newspapers, asking all interested and qualified parties to request bid information.
A. Admit

13. You promptly became aware of the GAA's request that interested and qualified parties request bid information relating to the 1978 Concession.
A. Admit

14. Competition for the 1978 Concession was strongly encouraged by the GAA.
A. Admit

16. The highest qualified bidder won the 1978 Concession.
A. Admit

17. You never requested bid information relating to the 1978 Concession.
A. Admit

19. You never in any way sought to bid for the 1978 Concession.
A. Admit

21. The pre-bid qualification criteria for the 1978 Concession were reasonable criteria which attempted to ensure that the concessionaire was financially sound and experienced in operating an airport concession.

A. Admit

22. You did not in 1978 challenge the pre-bid qualification criteria for the 1978 Concession as unreasonable, or in any way indicate to the GAA Board that you felt they were too restrictive.

A. Admit

23. You did not in 1978 ask the GAA to make the 1978 Concession non-exclusive.

A. Admit

24. You did not in 1978 seek to influence the GAA to offer non-exclusive rights to deliver goods at the GIAT.

A. Admit

25. You did not in 1978 ask the GAA to change its bid procedures or pre-bid qualification criteria for the 1978 Concession.

A. Admit

26. You did not seek to bid on or otherwise obtain the 1967 Concession.

A. Admit

27. You could not have competed for the 1967 Concession for the reason that you did not exist or you were not yet in business in Guam.

A. Admit

28. You have never requested permission to sell goods at the GIAT.

A. Admit

30. The health of the tourism industry is critical to the general economic welfare of Guam.

A. Admit

48. The GAA is authorized by its Rules and Regulations, and has been so authorized since at least 1977, to exclude anyone from making sales or deliveries of goods at the GIAT, unless that person has received written permission from the GAA to make such sales or deliveries.

A. Admit

48a. The GAA is authorized by its Rules and Regulations, and has been so authorized since at least 1977, to eject from the GIAT premises any person attempting to make sales and deliveries of goods at the GIAT without the required permission.

A. Admit

49. You have never received written permission from the GAA to sell or deliver goods at the GIAT.

A. Admit

51. The goods which you attempted to deliver at the GIAT are offered for sale by you, and paid for by customers, at locations other than the GIAT.

A. Admit

52. You are able to deliver the goods purchased by your customers at locations other than the GIAT.

A. Admit

53. You are able to, and do, sell and deliver goods to persons who will depart Guam via the GIAT even though you are not permitted to sell or deliver at the GIAT.

A. Admit

58. The price of the macadamia nut candy sold by you is higher than the price charged by DFS for similar candy sold by it in its Guam stores.

A. Admit

59. The price of the other goods sold by you is higher than the price charged by DFS for similar goods in its Guam stores.

A. Admit

60. You are one of the leading sellers of macadamia nut candy in Guam.
A. Admit

60a. You are the leading seller of macadamia nut candy in Guam.
A. Admit

61. Your business is profitable.
A. Admit

62. Japanese tourists and other persons are able to and do buy macadamia nut candy in Guam at stores other than those operated by DFS and you.
A. Admit

63. Japanese tourists and others can and do buy other goods, including gift items, from numerous vendors in Guam other than you and DFS.
A. Admit

64. Japanese tourists and others can and do buy goods, including gift items, at:

(a) The Carl Rose Gift Shop, Marine Drive, Tumon
A. Admit

(b) Townhouse Department Store, Agana Shopping Center, Route 4, Agana
A. Admit

(c) Para Para, Marine Drive, East Agana
A. Admit

(d) Hakubotan, Marine Drive, Tamuning
A. Admit

(e) Gibson's Department Store, Guam Shopping Center, Chalan San Antonio, Tamuning
A. Admit

(f) Europa House, Marine Drive, Tamuning
A. Admit

(g) Perez Store, Route 4, Ipan, Talofofo
A. Admit

(h) International Gift Center, Chalan San Antonio, Tamuning
A. Admit

(i) The various shops other than yours at the Tumon Sands Plaza, Tumon
A. Admit

(j) The gift shops at Cocos Island, Merizo
A. Admit

(k) Best Department Store, Marine Drive, Agana
A. Admit

(l) Jenny's Fashions
A. Admit

(m) the gift shop at the Guam Hilton Hotel, Tumon
A. Admit

65. The stores and shops listed in Request for Admission No. 64 endeavor to sell goods, including gift items, to Japanese tourists and other persons to which you and DFS also endeavor to sell goods.
A. Admit

66. None of the stores listed in Request for Admission No. 64 may sell or deliver goods at the GIAT.
A. Admit

67. You and the stores listed in Request for Admission No. 64, combined sell more goods, including gift items, than does DFS in Guam.
A. Admit

71. If you were allowed to make sales and/or deliveries at the GIAT, then all others so requesting would also have to be allowed to do so.
A. Admit

77. Tourists purchase goods, including gift items, all over Guam.

A. Admit

78. Tourists receive the goods, including gift items, they purchase on Guam at many locations in Guam other than the GIAT.

A. Admit

79. Orderly operation of the GIAT is critical to its proper functioning.

A. Admit

2. *Responses of Top Enterprises, Inc.*

8. Fostering the general welfare of the people of Guam is a lawful goal and mandate of the GAA.

A. Admit

9. The GAA made the 1978 Concession available to all interested and qualified parties through an open competitive procedure.

A. Admit

12. Prior to awarding the 1978 Concession, the GAA published formal notice in a variety of newspapers, asking all interested and qualified parties to request bid information.

A. Admit

13. You promptly became aware of the GAA's request that interested and qualified parties request bid information relating to the 1978 Concession.

A. Admit

14. Competition for the 1978 Concession was strongly encouraged by the GAA.

A. Admit

16. The highest qualified bidder won the 1978 Concession.

A. Admit

17. You never requested bid information relating to the 1978 Concession.

A. Admit

19. You never in any way sought to bid for the 1978 Concession.

A. Admit

21. The pre-bid qualification criteria for the 1978 Concession were reasonable criteria which attempted to ensure that the concessionaire was financially sound and experienced in operating an airport concession.

A. Admit

22. You did not in 1978 challenge the pre-bid qualification criteria for the 1978 Concession as unreasonable, or in any way indicate to the GAA Board that you felt they were too restrictive.

A. Admit

23. You did not in 1978 ask the GAA to make the 1978 Concession non-exclusive.

A. Admit

24. You did not in 1978 seek to influence the GAA to offer non-exclusive rights to deliver goods at the GIAT.

A. Admit

25. You did not in 1978 ask the GAA to change its bid procedures or pre-bid qualification criteria for the 1978 Concession.

A. Admit

26. You did not seek to bid on or otherwise obtain the 1967 Concession.

A. Admit

27. You could not have competed for the 1967 Concession for the reason that you did not yet exist.

A. Admit

30. The health of the tourism industry is critical to the general economic welfare of Guam.

A. Admit

44. The GAA is authorized by its Rules and Regulations, and has been so authorized since at least 1977, to exclude anyone from making sales or deliveries of goods at the GIAT, unless that person has received written permission from the GAA to make such sales or deliveries.

A. Admit

45. The GAA is authorized by its Rules and Regulations, and has been authorized since at least 1977, to eject from the GIAT premises any person attempting to make sales and deliveries of goods at the GIAT without the required permission.

A. Admit

46. You have never received written permission from the GAA to sell or deliver goods at the GIAT.

A. Admit

47. You are able to deliver the goods purchased by your customers at locations other than the GIAT.

A. Admit

48. You are able to, and do sell and deliver goods to persons who will depart Guam via the GIAT even though you are not permitted to sell or deliver at the GIAT.

A. Admit

51. The prices of the goods sold by you are as high or higher than the prices charged by DFS for similar goods in its Guam stores.

A. Admit

52. Your business is profitable.

A. Admit

53. Japanese tourists and others can and do buy goods, including gift items, from numerous vendors in Guam other than you and DFS in Guam.

A. Admit

54. Japanese tourists and others can and do buy goods, including gift items, at:

(a) The Carl Rose Gift Shop, Marine Drive, Tumon
A. Admit

(b) Townhouse Department Store, Agana Shopping Center, Route 4, Agana
A. Admit

(c) Para Para, Marine Drive, East Agana
A. Admit

(d) Hakubotan, Marine Drive, Tamuning
A. Admit

(e) Gibson's Department Store, Guam Shopping Center, Chalan San Antonio, Tamuning
A. Admit

(f) Europa House, Marine Drive, Tamuning
A. Admit

(g) Perez Store, Route 4, Ipan, Talofofo
A. Admit

(h) Yokohama Okadaya, Marine Drive, Tamuning
A. Admit

(i) The various shops at Tumon Sands Plaza, Tumon
A. Admit

(j) The gift shops at Cocos Island, Merizo
A. Admit

(k) Dragon Duty Free Shop, Tumon
A. Admit

(l) Jenny's Fashions
A. Admit

(m) The stores and gift shop at the Guam International Trade Center, Tamuning
A. Admit

(n) Pacific Gift Supply, Inc.
A. Admit

55. The stores and shops listed in Request for Admission No. 54 endeavor to sell goods, including gift items, to Japanese tourists and other persons to which you and DFS also endeavor to sell goods.
A. Admit

56. None of the stores listed in Request for Admission No. 54 may sell or deliver goods at the GIAT.
A. Admit

58. Some of your stores are able to and do make deliveries of goods to tourists at their hotels as a special service.
A. Admit

61. If you were allowed to make sales and/or deliveries at the GIAT, then all others so requesting would also have to be allowed to do so.
A. Admit

67. Tourists purchase goods, including gift items, all over Guam.
A. Admit

68. Tourists receive the goods, including gift items, they purchase on Guam at many locations in Guam other than the GIAT.
A. Admit

69. Orderly operation of the GIAT is critical to its proper functioning.
A. Admit

(3)

Supreme Court, U.S.
FILED
NOV 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-552

No. __________

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

YOSH SAKAMOTO, PACIFIC GIFT SUPPLY
and TOP ENTERPRISES, INC.,
Petitioners,

v.

DUTY FREE SHOPPERS, LTD., GUAM AIRPORT
AUTHORITY and THE GOVERNMENT OF GUAM
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court lacked subject matter jurisdiction because of the Government of Guam's immunity from suit.

2. Whether the commerce clause applies to the unincorporated territory of Guam.

3. Whether the territory of Guam is immune from antitrust liability.

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No. __________

IN THE SUPREME COURT OF THE
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DUTY FREE SHOPPERS, LTD., GUAM AIRPORT
AUTHORITY and THE GOVERNMENT OF GUAM
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Government of Guam, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 764 F.2d 1285.

REASONS FOR DENYING THE WRIT

Petitioners say the decision below is in conflict with the intent of Congress, case law of the Supreme Court, case law of the Third Circuit, law in the District of Columbia Court of Appeals, and in derogation of the right of Congress to make rules and regulations for the territories. The decision below is none of these things. It is correct.

Accordingly, the writ petitioners seek should be denied for the reasons set forth in the Brief in Opposition filed by respondents Duty Free Shoppers, Ltd. and Guam Airport Authority and for the reasons set forth below.

1. There is no subject matter jurisdiction because the government of Guam is immune from suit on these causes of action.

Prior to 1959, the government of Guam was entirely immune from suit. **Crain v. Government of Guam,** 195 F.2d 414 (9th Cir. 1952). In that year Congress passed an amendment to the Organic Act, 48 U.S.C. 1421(a), which authorized the Guam legislature to waive immunity in certain contract and tort cases:

> The government of Guam shall have the powers set forth in this chapter, shall have power to sue by such name, **and, with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers.** [Material underlined was added by Act of September 21, 1959, Pub. L. 86-0316, 78 Stat. 588.]

Accordingly, the Guam legislature enacted the Government Claims Act, Chapter VI of Title VII of the Government Code of Guam as repealed and reenacted by Public Law 17-29. The waiver of immunity is as follows:

> **§ 6500.04. Waiver of Immunity.**
> Pursuant to section 3 of the Organic Act of Guam, the Government of Guam hereby waives immunity from suit, but only as hereinafter provided:
>
> (a) for all expenses incurred in reliance upon a contract to which the Government of Guam is a party, but if the contract has been substantially completed, expectation damages may be awarded;
>
> (b) for claims in tort, arising from the negligent acts of its employees, or volunteers acting for and at the direction of the Government of Guam, even though occurring in an activity to which private persons do not engage. For the purposes of this Chapter, any officer or enlisted person of the Guam National Guard on territorial duty shall be deemed an employee of the Government.
>
> (c) The Government of Guam shall not be liable for claims arising from an exercise of discretion in making policy. In 1978 a group of teachers sued the government for failure to renew their teaching contracts in violation of a 1972 collective bargaining agreement.

In 1978 a group of teachers brought suit against the government of Guam for failure to renew their teaching contracts in violation of a 1972 collective bargaining agreement. The

Appellate Division of the District Court of Guam held the doctrine of sovereign immunity applies to actions for equitable relief to compel government officials to perform their duties properly. **Alexander v. Bordallo** 2 Guam R 1978 (1979). It further determined appellants' failure to file a government claim precluded their suit.

When the government of Guam was sued for injuries inflicted by a police officer in **Munoz v. Government of Guam,** 625 F.2d 257 (1980), the Ninth Circuit held the government had not waived its immunity for intentional torts, saying: "The Guam legislature has consented to be sued in limited circumstances." The court found "utterly without merit" appellants' arguments that the limited waiver was unconstitutional.

In **Pacific Drilling, Inc. v. Marianas Drilling, Inc.,** D.Guam App.Div., No. 85-0016A (1985) (see Appendix at pg. 1), the underlying action was for declaratory relief. The court said such an action was neither for "expenses incurred in reliance upon a contract" nor for "claims in tort", did not come within the general waiver of immunity set forth in section 6500.04, and held the trial court lacked subject matter jurisdiction.

Petitioners' claims must suffer the same fate. They too are not for "expenses incurred in reliance upon a contract" nor for "claims in tort".

2. The Commerce Clause does not apply to the unincorporated territory of Guam.

The Commerce Clause refers only to commerce between the states, foreign nations and Indian tribes. U.S. Const. art. I, §8, cl.3. On its face it does not apply to territories. Congress may extend all or any part of the constitution to territories in the exercise of its plenary power over them. U.S. Const. art IV, §3, cl.2.

The Commerce Clause did apply to the Territory of Alaska. As explained in **Mullaney v. Anderson**, 342 U.S. 415, 72 S.Ct. 428 (1952), the Organic Act of Alaska, section 3, provided that the Constitution of the United States should have the same force and effect within the Territory as elsewhere in the United States.

Petitioners say an examination of the statutes of Alaska and Guam shows that the Congressional grant of legislative power to these two territories was almost identical. Pet 5. This is not the point. The point is that Congress applied the Commerce Clause to Alaska. It did not apply it to Guam. 48 U.S.C. §1421(b)-(u)

Petitioners are correct when they say the language of the Constitution makes no distinction between incorporated and unincorporated territories. Pet 4. But, Congress has plenary power over all territories, incorporated or unincorporated. In the exercise of this plenary power, Congress has made distinctions between incorporated and unincorporated territories.

3. The government of Guam is immune from antitrust liability.

Congress has excluded territories from two sections of the Sherman Act; 15 U.S.C. §§1 and 2. The language in those sections refers to trade or commerce among the several states or with foreign nations. The source of power enabling the creation of these sections is the Commerce Clause. By contrast, in 15 U.S.C. §3 Congress uses its plenary power over territories to legislate about a much broader range of activities than allowed by the Commerce Clause. **People of Puerto Rico v. Shell Co.**, 302 U.S. 253, 58 S.Ct. 167 (1937). Even here, the government of Guam is immune from suit. This immunity derives from section 3 of Guam's own Organic Act, a federal law, and Guam's exclusion from the definition of "persons" affected by the section. 48 U.S.C. §1421(a); **Ignacio v. Salas**, D. Guam, No. 79-00118 (1982) (holding Guam is not a person for purposes of 48 U.S.C. §1983) (see Appendix at pg. 8). Where Congress has addressed the issue of Guam's status vis-a-vis the antitrust laws, it has likened Guam to a state. Clayton Act, 15 U.S.C. §15 g(2); Local Government Antitrust Act of 1984, Pub. L. 98-544.

Petitioners' argument that the Ninth Circuit treats Guam as a robot and its decision, therefore, should be overturned misses the mark. Regardless of petitioners' description of the relationship between Guam and the United States, this Court has stated as recently as 1978 that territorial governments are entirely the creation of Congress. **United States v. Wheeler**, 435 U.S. 313, 98 S.Ct. 1079. Guam may have more attributes of self-government than are attributed to it by the Ninth Circuit, but that is no reason for the Court to consider overturning the decision below. The fact remains this Court in its decisions has held territorial powers of government derive entirely from Congress.

Petitioners say there is simply no authority for the proposition that a local territorial government, whose chief executive officer is elected by the people of Guam, and an autonomous agency of this government, whose directors are appointed by that chief executive, may exempt themselves from federal antitrust laws. Pet 12. The Ninth Circuit did not say this. It said acts of both state and federal intrumentalities are immune from antitrust liability. Further, it is not the local government that has made itself immune from suit but Congress in the Organic Act that has granted to the territorial government its immunity.

Petitioners try to fit this case within the line of Supreme Court cases holding that municipalities, unlike state governments and federal instrumentalities, are not immune unless acting pursuant to clearly articulated and affirmatively expressed state policy to displace competition. Pet A-27. That analysis, however, is inapplicable to this case because the territory of Guam has only a single sovereignty; that of the United States. Moreover, Congress has specifically granted Guam its immunity.

In answer to the questions presented by petitioners:

No, the government of Guam is not bound by the same limitations that prevent states and their political subdivisions from burdening interstate commerce.

Yes, the government of Guam and its instrumentalities are immune from federal antitrust laws because of their derivative federal sovereignty and because Congress has granted that immunity by specific law.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted this 6th day of November, 1985.

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[Appendix follows]

APPENDICES

Appendix A

IN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM
APPELLATE DIVISION

PACIFIC DRILLING,)
INC.,)
Defendant-Appellant) DCA CIVIL CASE
v.) NO. 85-0016A
)
MARIANAS DRILLING,) OPINION
INC.,)
Plaintiff-Appellee.)
)

BEFORE: DUENAS, LAURETA and WATERS[*],
District Judges

WATERS, District Judge

Pacific Drilling, Inc. (hereinafter "PDI") appeals from a judgment of the Superior Court of Guam declaring improper, illegal and thus unenforceable a provision contained in three agreements between PDI and the Public Utility Agency of Guam (hereinafter "PUAG"). We reverse and remand with instructions.

I.

On October 21, 1978, PUAG solicited bids for a five-year maintenance and repair service contract for Guam's water system. The lowest proposal was submitted by PDI. Appellee,

---

[*] The Honorable Laughlin E. Waters, United States District Judge for the Central District of California, sitting by designation.

Marianas Drilling, Inc. (hereinafter "MDI") was not in existence at the time of the solicitation. Following negotiations, PDI and PUAG entered into a contract beginning February 1, 1979 and extending through January 31, 1984 (hereinafter "the Original Agreement"). This agreement provided that PDI would be paid a flat monthly rate to supply both services and parts as required to maintain the water system. PDI was obligated to acquire and maintain an inventory of spare parts and supplies which PUAG agreed to repurchase at the "then replacement cost" upon the expiration or termination of the contract. The contract was renewable every year at the option of PDI. The contract price was subject to annual negotiations to take into account possible fluctuations of certain specified cost elements. PUAG reserved the right at any time to terminate the contract "for its convenience" upon 60 days' written notice.

In January of 1980, PUAG and PDI renewed the contract and agreed to certain upward modifications of the contract price. This agreement was memorialized in a new written document (hereinafter "the Second Agreement"). Although the Second Agreement provided for a duration of four years (presumably, the original five-year period minus the year that had already been performed) and should have thus expired on January 31, 1984, it contained the inconsistent expiration date of January 31, 1985.

On March 27, 1981, PUAG notified PDI of its intention to terminate the contract as of May 1, 1981 pursuant to the "convenience of the government" clause. According to the testimony at trial, no reason was ever given for this action. Subsequently, however, PUAG entered into further negotiations with PDI which culminated in a new agreement between the parties on December 1, 1981 (hereinafter "the Third Agreement").

This agreement modified the terms of PUAG's repurchase obligations by giving to PUAG the right to take inventory of the spare parts and supplies in the last year of the contract and the right to approve any purchases made by PDI in the last six months of the contract. The Third Agreement further changed the repurchase price formula from "the then replacement cost" to 1) "contractor's cost plus 50%" for new and unused parts and supplies and 2) "fair market value" for used parts, supplies and equipment. The obligation to repurchase equipment had not been a part of the first two contracts. PDI and PUAG agreed to an expiration date for the Third Agreement of December 1, 1984, ten months beyond the termination date specified in the Original Agreement.

On December 1, 1982 and again on December 1, 1983, PUAG and PDI once again renegotiated the contract price and renewed the contract. The resulting agreements (hereinafter "the Fourth and Fifth Agreements") were identical in all relevant respects to the Third Agreement except for certain upward price modifications and expanded upper limit on PUAG's total possible exposure under the repurchase provision.

MDI filed its complaint for declaratory relief against PUAG, PDI and the government of Guam on December 21, 1983, 20 days after the date of the Fifth Agreement. It alleged that the various negotiations between PDI and PUAG violated unspecified Guam law requiring open and competitive bidding for procurement and service contracts. MDI sought a declaration that all agreements between PUAG and PDI be terminated as of January 1, 1984, that each and every provision requiring PUAG to repurchase PDI's parts, supplies, materials and/or equipment was invalid, and that PUAG "comply with Government of Guam's laws, rules and regulations concerning competitive bidding for all future contracts let by PUAG."

PDI answered, denying the substantive allegations of the complaint and asserting the affirmative defenses of laches, detrimental reliance, standing, and MDI's failure to comply with the Government Claims Act. PUAG's answer admitted the majority of the substantive allegations and "prayed" for a judgment identical to that sought by MDI.

Trial was held on September 13, 1984. Following a two-day court trial, the Superior Court ruled that the contested agreements were valid except for the repurchase provisions contained in the Third, Fourth and Fifth Agreements. These provisions were declared to be against the public interest and thus illegal and unenforceable except insofar as their implementation was limited to PDI's "present CIF Guam cost" for only those "vehicles, tools, materials and supplies" which PDI had originally purchased from PUAG. Judgment was entered on January 3, 1985 and MDI timely appealed.

PDI raises several issues on appeal. First, it argues that MDI had no standing to challenge a contract which was awarded prior to MDI's corporate birth and that the superior court erred in determining that it could render judgment in this case regardless of MDI's standing. Second, PDI maintains that the contract between itself and PUAG was exempted from competitive bid requirements by Guam Government Code § 21024. Third, PDI challenges the trial court's determination that PUAG's repurchase obligations under the contract were prejudicial to the government. Fourth, it is argued that the trial court's interpretation of the scope of these repurchase obligations was clearly erroneous. Finally, PDI asserts that the trial court erred in refusing to invoke the doctrine of laches against MDI. For the reasons set forth below, it is unnecessary that we resolve these issues.

II.

This action was brought against, **inter alia**, the government of Guam and PUAG, a separate instrumentality within the government of Guam pursuant to Guam Government Code § 21206, **amended by** P.L. 16-59 (1982). A review of the record below reveals that neither counsel nor the trial court raised the issue of sovereign immunity.

The question of the immunity of a sovereign from suit is a question of subject matter jurisdiction. **United States v. Mitchell,** 445 U.S. 535, 538, (1980). In the absence of clear congressional intent, unequivocally expressed, jurisdiction over a sovereign does not lie. **United States v. Sherwood,** 312 U.S. 584, 586 (1941). Although the parties have not addressed this issue, it may be raised at any stage of the proceeding, either by the parties or by the court, **People of the State of California v. Quechan Tribe of Indians,** 595 F.2d 1153, 1154 n.1 (9th Cir. 1979), and failure by the government to raise this issue does not constitute a waiver, **Henninger v. United States**, 473 F.2d 814, 816 (9th Cir.), **cert. denied**, 414 U.S. 819 (1973).

The government of Guam is an unincorporated territory of the United States which has the power to sue by name, and "with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful purposes." 48 U.S.C. § 1421a. The Guam legislature has evidenced a limited intent to permit suit against the government in section 6500.01 of the Government Claims Act, Guam Government Code §§ 6500.00-6500.21:

> **Section 6500.1 Waiver of Immunity**. The government of Guam hereby waives immunity from liability, but only as hereinafter provided:
>
> (a) for all expenses incurred in reliance upon a contract to which the government of Guam or any of its departments, agencies or funds is a party, but if the contract has been substantially completed, expectation damages may be awarded;
>
> (b) for claims in tort, arising from the negligent acts of its employees, even though occurring in an activity in which private persons do not engage.
>
> The government shall not be liable for claims arising from an exercise of discretion in making policy.

The underlying action here was brought for declaratory relief in connection with a government contract to which the plaintiff was not even a party. Such an action is neither for "expenses incurred in reliance upon a contract" nor for "claims in tort" and does not, therefore, come within the general waiver of sovereign immunity set forth in section 6500.01. Consequently, absent a more specific statutory waiver applicable to the case at bar, the trial court lacked subject matter jurisdiction over the government of Guam and PUAG[1].

The Guam legislature has provided just such a waiver in P.L. 16-124, passed December 30, 1982. An Act to Establish a General Services Agency Responsible for Procurement of Supplies in the Government of Guam, Pub. L. No. 16-124 (1982) (hereinafter "P.L. 16-124" or "the Act"). This Act, among other things, establishes the General Services Agency of Guam, a governmental entity responsible for the procurement of all supplies and services for the government of

Guam, and further establishes various mandatory regulations concerning such procurement. Most pertinent to the case at hand, P.L. 16-124 enacts Guam Government Code §6978 which reads in relevant part as follows:

> **Section 6978. Waiver of Sovereign Immunity in Connection with Contracts.**
>
> (a) Solicitation and Award of Contracts. The Superior Court of Guam shall have jurisdiction over an action between the Territory and a bidder, offeror, or contractor, either actual or prospective, to determine whether a solicitation or award of a contract is in accordance with the statutes, regulations, and the terms and conditions of the solicitation. The Superior Court shall have such jurisdiction in actions at law or in equity, and whether the actions are for declaratory, or other equitable relief.

The legislative comments indicate that such a specific waiver of sovereign immunity was deemed necessary by virtue of the very limited waiver contained in the Government Claims Act. Pursuant to section 6978(a), an unsuccessful actual bidder or a prospective bidder may now challenge in a declaratory relief action the award of a contract by the government.

Clearly, if P.L. 16-124 is applicable to the instant case, the issue of sovereign immunity dissolves in the clear language of newly enacted section 6978(a). By its own terms, the Act has an effective date of October 1, 1983.[2] Furthermore, the Act specifically applies only to contracts "solicited or entered into" after the effective date. P.L. 16-124 (to be codified at Guam Gov't Code §6950.3(a)). Although the various agreements at issue here were all negotiated pursuant to the terms of the October 21, 1978 bid solicitation, in other words, solicited before the effective date, it could be argued that the final agreement, dated December 1, 1983, was in fact a separate contract and as such was "entered into" after the effective date of P.L. 16-124. The issue of whether the agreements here constitute one or several contracts was never addressed by the trial judge. This Court, therefore, remands the case for resolution of that question. If it is determined that one contract existed; the trial court is instructed to dismiss the case in its entirety for lack of subject matter jurisdiction.[3] If it is determined that the December 1, 1983 agreement constituted a separate contract, further proceedings shall be conducted to determine the appropriate disposition of this case pursuant to the provisions of P.L.16-124, the only law under which the trial court properly could exercise jurisdiction.

The judgment of the trial court is reversed and remanded with instructions.

DATED: 13 Sept. 85 /s/
CRISTOBAL C. DUENAS

DATED: 19 Sept. 85 /s/
ALFRED LAURETA

DATED: 6 Sept. 85 /s/
LAUGHLIN E. WATERS

FOOTNOTES

1. The right to sue an agency of a sovereign "is limited to the extent of the pertinent waiver of sovereign immunity." **Singer v. Schweiker**, 694 F.2d 616, 617 (9th Cir. 1982). Unlike most governmental agencies of Guam, PUAG is not specifically authorized to sue and be sued in its own corporate name. **Compare** Guam Gov't Code § 21206, **as amended by** P.L. 16-59 (PUAG),

with Guam Gov't Code § 53653(d) (Guam Economic Development Authority). Consequently, no independent waiver of immunity exists with regard to PUAG, and jurisdiction over this agency will be proper only to the extent that jurisdiction over the government lies.

2. P.L. 16-124 enacts Guam Government Code § 6950.8 which reads: "This Title shall become effective aT 12:01 A.M. on October 1, 1983, but shall be deemed effective immediately for purposes of planning and organization." For reasons that were never set forth, the trial court found that P.L. 16-124 became effective on its enactment date, December 30, 1982.

3. PUAG and the Goverment of Guam are clearly "indispensable parties" pursuant to Rule 19(b) of the Guam Rules of Civil Procedure in this action challenging a contract to which they are parties. Consequently, if the trial court did not have jurisdiction over PUAG and the Government of Guam the action must be dismissed as to PDI as well.

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Appendix B

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

ANTONIO S.A. IGNACIO ALAN BORJA FLORES, DAVEY C. CAMACHO, ARTHUR SCOTT ROOT, and WILLIAM GARRARD, on behalf of thermselves and others similarly situated, Plaintiffs,	Civil Case No. 79-00118
vs.	
RICARDO A. SALAS, Director of Corrections, Government of Guam, and DOES 1through 10, Defendants.	ORDER

The motion of the Government of Guam for an order to dismiss the Government of Guam as a Defendant in this §1983 Civil Rights Action came on regularly to be heard by the Court on May 21, 1982. The Government of Guam was represented by Nancy Nye and the Plaintiffs were represented by Terry Timblin.

Title 42 U.S.C. §1983 reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

> privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

The Government of Guam correctly contends that it is not a "person" subject to suit within the meaning of §1983. A brief background of the case law in this area is warranted.

The Supreme Court in **Monroe v. Pape**, 365 U.S. 167 (1960), addressed the issue of whether a "municipal corporation" could be considered a "person" in a §1983 Civil Rights Action. The Court held that a municipal corporation is not a "person" subject to suit within the meaning of 42 U.S.C. §1983.

Then, the Ninth Circuit of Appeals, relying heavily on the **Monroe** decision ruled that a "state", like a "municipality" was also not a "person" subject to suit under §1983. **Williford v. State of California**, 352 F.2d 474 (9th Cir. 1965). The Court reasoned that "[a] municipal corporation is but a political subdivision of a state, and if a state's political subdivisions are not 'persons' under the statute, then neither is the state". **Id.** at 476.

The Ninth Circuit Court of Appeals next addressed the issue of whether the Territory of Guam could be considered a "person" as referred to in §1983. **Perez v. Government of the Unincorporated Territory of Guam**, 9th Cir. Ct. of App., No. 72-1563, Nov. 28, 1972. The Court held, relying on the decision in **Monroe** and a long line of progeny, "that Guam is entitled to the same status as any city or state of the union and is not to be penalized for being a territory".

Then, in June, 1978, the **Monroe** decision was partially overruled by **Monnel v. Department of Social Services of the City of New York**, 436 U.S. 658, 690, 98 S.Ct. 2018 (1978), with the Supreme Court ruling that: "our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom §1983 applies. Local governing bodies, therefore, can be sued directly under §1983 for monetary, declaratory or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers".

The question then arose whether "states" were now to be considered "persons" for §1983 purposes.

The Supreme Court answered this question in its recent decisions of **Alabama v. Pugh**, 438 U.S. 781, 98 S.Ct. 3057 (1978) and **Quern v. Jordan**, 440 U.S. 332, 99 S.Ct. 1139 (1979). The Court in those cases held that a state is immune from a §1983 Civil Rights Action pursuant to the Eleventh Amendment unless the State has consented to such suit.

As both parties have acknowledged, the Eleventh Amendment has never been extended to Guam for the obvious reason that Guam is not a state. 48 U.S.C. 1421(b)(u). However, it has been held that the Government of Guam has sovereign immunity from suit unless it consents to be sued. **Munoz v. Government of Guam**, 625 F.2d 257, 258 (9th Cir., 1980) and **Crain v.**

Government of Guam, 195 F.2d 414 (9th Cir., 1952).

The Government of Guam has only consented to be sued in certain contract cases and for claims in tort arising from the negligent acts of its employees. Government Code of Guam §6500.01(b). It has never waived its sovereign immunity and consented to be sued in a §1983 Civil Rights Action. Thus, we hold that the Government of Guam is not a "person" subject to suit within the meaning of §1983.

Based on the foregoing, it is ordered that the Motion to Dismiss the Government of Guam as a Defendant in this §1983 Civil Rights Action is granted.

SO ORDERED.

Dated this **26th** day of May, 1982.

______________/s/__________
CRISTOBAL C. DUENAS
JUDGE, DISTRICT COURT OF GUAM

Supreme Court, U.S.
FILED
FEB 26 [illegible]
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 85-552

In the Supreme Court of the United States

OCTOBER TERM, 1985

YOSH SÁKAMOTO, ET AL., PETITIONERS

v.

DUTY FREE SHOPPERS, LTD., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Territorial Government of Guam and its instrumentalities are subject to the negative implications of the Commerce Clause.

2. Whether the Territorial Government of Guam and its instrumentalities are subject to federal antitrust laws.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-552

YOSH SAKAMOTO, ET AL., PETITIONERS

v.

DUTY FREE SHOPPERS, LTD., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's invitation to the Solicitor General to state the views of the United States concerning this case.

STATEMENT

1. Petitioners Yosh Sakamoto, Pacific Gift Supply, and Top Enterprises, Inc. (Petitioners) and respondent Duty Free Shoppers, Ltd. (Duty Free) sell gift merchandise in Guam, primarily to Japanese tourists (Pet. 3; Pet. App. 22-23). In 1967, respondent Government of Guam granted an exclusive merchandising concession at the Guam International Airport Terminal (the Terminal) to Jones & Guerrero Co., which in turn assigned the Terminal concession to Duty Free in 1972 (Pet. App. 3). In 1978, respondent

Guam Airport Authority (the Authority), an autonomous instrumentality of the Guam government that has operated the Terminal since 1975, publicly solicited bids on the Terminal's exclusive concession (Pet. App. 3-4). Respondent Duty Free was the high bidder, offering more than $140,000,000 for a fifteen-year concession and five-year option (Pet. App. 4, 23). The Authority has used revenues from the concession agreement to fund a substantial portion of the construction costs of a new airport terminal that was completed on January 20, 1982 (*ibid.*).

Under the exclusive concession agreement, only respondent Duty Free may sell or deliver merchandise to customers at the Terminal (Pet. App. 1, 23). The restriction on deliveries applies regardless of the location of the original sale (Pet. App. 4-5, 23). Petitioners claim that the delivery restriction harms their business because Guam has become a resort area for Japanese tourists, who request that their gift purchases be delivered to them at the Terminal on their day of departure (Pet. 3).

2. Petitioners filed a complaint in the United States District Court for the District of Guam alleging that the delivery restriction in the Authority's exclusive concession agreement with Duty Free violates, inter alia, the Commerce Clause and the Sherman Act (Pet. App. 1-2). Petitioners subsequently filed a motion for partial summary judgment on several of its claims, including the Commerce Clause and Sherman Act causes of action (Pet. App. 2), and respondents filed a cross-motion for summary judgment (*ibid.*).

3. The district court granted respondents' motion for summary judgment, dismissing petitioners' complaint (Pet. App. 1-21). The court held (Pet. App. 18-19) that the negative implications of the Commerce Clause do not apply to Guam. On the Sherman Act issue, the court ruled (Pet. App. 6-11) that the government of Guam and the Authority

are federal agencies or instrumentalities not subject to federal antitrust laws and that Duty Free is immune from antitrust scrutiny under this Court's decisions in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965).[1]

4. The court of appeals affirmed, holding that neither the Commerce Clause nor federal antitrust laws restrict respondents' activities pursuant to the exclusive concession agreement (Pet. App. 22-28; 764 F.2d 1285). Judge Hug, concurring, expressed the view that the Commerce Clause does apply, but that the agreement does not "burden * * * interstate commerce" (Pet. App. 29).

DISCUSSION

The court of appeals correctly ruled that the federal antitrust laws do not apply to the government of Guam in this case, but erroneously concluded that the negative implications of the Commerce Clause do not apply. Because, however, there is little to suggest that the exclusive concession agreement constitutes an undue burden on interstate or foreign commerce, the petitioners' Commerce Clause claim, too, is insubstantial and does not warrant this Court's review. Accordingly, the Court should deny the petition for a writ of certiorari.

1. The special status of Guam is central to a determination of the applicability of either the dormant Commerce Clause or federal antitrust laws to activities of the government of Guam. The unique features of Guam, and of its government, are not conducive to simple application of the

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[1] The district court also held that petitioners' antitrust claims fail for lack of standing, are barred by laches and the applicable statute of limitations, and are subject to the valid defense that the concession agreement is reasonable (Pet. App. 11-18).

concerns and legal categories typically determinative of Commerce Clause or antitrust law claims.

Guam is an unincorporated territory and, accordingly, falls within Congress's "general and plenary" authority under the Territories Clause, U.S. Const. Art. IV, § 3, Cl.2.[2] See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U.S. 1, 42 (1890); see also *Downes* v. *Bidwell,* 182 U.S. 244, 306-339 (1901) (White, J., concurring) (setting forth the distinction between incorporated and unincorporated territories). Pursuant to that Clause, Congress has granted Guam significant powers of self-government (see generally Organic Act of Guam, 48 U.S.C. (& Supp. I) 1421-1424), while reserving the power inherent in the Territories Clause to annul territorial legislation (48 U.S.C. 1423i).[3] Accordingly, the government of Guam is, in certain respects, akin to a federal instrumentality or " 'agency of the federal government' " (see *United States* v. *Wheeler*, 435 U.S. 313, 321 (1978), quoting *Domenech* v. *National City Bank*, 294 U.S. 199, 204-205 (1935)). Yet, the government of Guam sharply differs in composition and function from most federal agencies and instrumentalities; by congressional design, the government of Guam, while theoretically subject to plenary congressional oversight, resembles an autonomous sovereign, with both elected officials (see 48 U.S.C. 1422; 48 U.S.C. (& Supp. I) 1423) and the general structure and responsibilities of the fifty States.[4]

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[2] The Territories Clause confers upon Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *." U.S. Const. Art. IV, § 3, Cl. 2.

[3] We know of no instance in which this congressional power of annulment has been exercised in the case of Guam.

[4] For this reason, the Department of the Interior has expressed the view that Guam should not, in certain contexts, be treated like a federal

2. a. Examination of the Commerce Clause issue must start with the well-settled proposition that not all provisions of the Constitution apply of their own force to unincorporated territories, and that Congress may determine whether the application of particular provisions would be appropriate in each such territory. *Torres* v. *Puerto Rico*, 442 U.S. 465, 469-470 (1979). The Organic legislation establishing the government of Guam nowhere provides for full application of the Constitution. Indeed, the legislative history surrounding passage of the Organic Act for Guam reveals deliberate legislative intent not to apply the Constitution generally to Guam.[5]

The task of deciding whether a particular constitutional provision applies in an unincorporated territory such as Guam has been largely left to the courts, with "a [congressional] determination that [the] constitutional provision practically and beneficially may be implemented in [the] territory entitled to great weight" (442 U.S. at 470).[6] In a case, such as this one, where no fundamental individual right or structural principle is at stake[7] and no

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instrumentality. See, *e.g.*, *Procurement of the Government of Guam-Applicability of the Buy American Act and Federal Procurement Regulations System*, 74 Interior Dec. 365 (1967) (statute and regulations inapplicable to Guam). See also S. Rep. 99-141, 99th Cong., 1st Sess. 50 (1985) (emphasis omitted) (report on Department of the Interior appropriations bill for 1986) ("* * * Guam * * * [is not an] agenc[y] or instrumentalit[y] of the Federal Government").

[5] Proponents of the bill emphasized that it did not extend full constitutional protection to Guam, in contrast to congressional treatment of incorporated territories such as Alaska and Hawaii (96 Cong. Rec. 7562-7563 (1950) (statement of Cong. Peterson)).

[6] Congress did provide in Guam's organic legislation a bill of rights modeled after our own (48 U.S.C. 1421b). In addition, Congress has more recently authorized adoption of a Constitution for Guam. See Pub. L. No. 94-584, 90 Stat. 2899 *et seq.*

[7] *Balzac* v. *Porto Rico*, 258 U.S. 298, 312-313 (1922) ("the guaranties of certain fundamental personal rights declared in the Constitution

congressional determination that the Constitution should generally apply is evident,[8] a constitutional limitation should not apply absent some showing of affirmative legislative intent favoring its application. The need for congressional intent is especially compelling in the instant context because any potential burdens on interstate or foreign commerce created by the government of Guam are, at least in theory, redressable through congressional plenary authority over Guam. To that extent, we agree with respondents that the "dormant Commerce Clause therefore should apply to a territorial government only if Congress applies it" (Resp. (Authority) Br. in Opp. 11).

b. We agree with respondents, moreover, that no such showing of affirmative congressional intent is supplied in the provision of the Organic Act subjecting the legislative power of the government of Guam to "the laws of the United States applicable to Guam" (48 U.S.C. 1423a). This provision does not in any way say which United States laws do apply. And, even if this provision were interpreted to refer to constitutional provisions as well as statutory laws of the United States,[9] it obviously was not intended to suggest

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* * * had from the beginning full application * * *); see also *Northern Mariana Islands* v. *Atalig*, 723 F.2d 682, 688 (9th Cir. 1984), cert. denied, No. 83-6424 (June 11, 1984). Even if the Constitution's structural provisions, governing the relationships between the national and state governments, are "always and everywhere applicable" (*Balzac* v. *Porto Rico*, 258 U.S. at 312), the negative Commerce Clause is nonetheless not "fundamental" in this sense because territories are not states and therefore do not implicate federalism concerns.

[8] See *Mullaney* v. *Anderson*, 342 U.S. 415, 419-420 (1952) (extending Privileges and Immunities Clause (Art. IV, § 2, Cl. 1) to Alaskan territory); see also *Duncan* v. *Kahanamoku*, 327 U.S. 304, 31 (1946) ("Congress did not intend the Constitution to have a limited application to Hawaii").

[9] But see Act of Aug. 1, 1950, ch. 512, § 25(b), 64 Stat. 391 (provision of original Organic Act, since repealed, directing the President to determine which "law[s] of the United States" shall be "applicable to

general application of the Constitution, in light of Congress's express intent not to apply the Constitution generally (see note 5, *supra*).

c. We find evidence of congressional intent to apply the negative implications of the Commerce Clause to the government of Guam, however, in statutory language not yet focused on by the parties or considered by the courts below. Congress conferred upon the Guam legislature the power of a legislature, but only to the extent of "subjects of legislation of *local application*" (48 U.S.C. 1423a (emphasis added)), most likely picking up on language Congress had used previously in organic legislation concerning the Virgin Islands. See Act of June 22, 1936, ch. 699, § 19, 49 Stat. 1811. On the floor of the House, a principal supporter of the legislation echoed the "local" theme, referring to the broad legislative powers Guam would have within the "local legislative sphere" (96 Cong. Rec. 7563 (1950) (letter of Congressman Crawford)). This, perhaps seemingly innocuous, modifier bore special significance in the Commerce Clause context during the general time period that Congress drafted the legislation for the Virgin Islands and for Guam. In particular, the term "local" was a term of art, then, that suggested the limits of a state's legislative powers under the negative implications of the Commerce Clause. See generally *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615 (1981); see also *Freeman* v. *Hewit*, 329 U.S. 249, 252-254 (1946). Accordingly, congressional usage of the "local" modifier in this context can be taken to indicate an intent to subject the Guam legislative powers, like those of a state, to the bounds supplied by the dormant Commerce Clause.

Guam" and seeming to equate "law[s]" with "statutes"); see also 48 U.S.C. 1423d, 1424(a) (treating "laws of the United States" and "Constitution" as distinct categories); U.S. Const. Art. III, § 2, Art. VI, Cl. 2 (same).

Doubt about the import of this isolated modifier is greatly reduced, moreover, by subsequent congressional action that both corroborates the significance of the term "local" and reveals a congressional assumption that the dormant Commerce Clause applied to the government of Guam. The 1950 Organic legislation directed the President to appoint a Commission to determine which laws of the United States should apply to Guam. § 25(b), 64 Stat. 391. One specific recommendation of the Commission, discussed favorably and adopted by both houses of Congress, was to extend to Guam congressional protection from the dormant Commerce Clause recently provided (in the McCarran-Ferguson Act, 15 U.S.C. (& Supp. II) 1011 *et seq.*) to state regulation of the business of insurance.[10] Congress considered such protection for Guam necessary in the aftermath of a decision of this Court,[11] which, Congress concluded, threatened the accepted notion that "the business of regulating insurance [was] a proper subject of *local law*." S. Rep. 2662, 84th Cong., 2d Sess. 4 (1956) (emphasis added) (report on bill extending federal laws to Guam); H.R. Rep. 2259, 84th Cong., 2d Sess. 6 (1956) (same); House Comm. on Interior and Insular Affairs, *Report of the Commission on the Application of Federal Laws to Guam,* H.R. Doc. 212, 82d Cong., 1st Sess. 5 (1951); see also Staff of House Comm. on Interior and Insular Affairs, 82d Cong., 2d Sess., *Resource Material Used in the Preparation of the Report of the Commission on Application of Federal Laws to Guam* 97-98 (Comm. Print 1952). Passage of the proposal extending the reach of the McCarran-Ferguson Act to Guam (Act of Aug. 1, 1956, ch. 852, § 4, 70 Stat. 908), therefore, confirms that Congress assumed that the negative implications of the Commerce Clause otherwise confined the "local" legislative powers of Guam.

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[10] See *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 653-655 (1981). See also *Metropolitan Life Ins. Co.* v. *Ward*, No. 83-1274 (Mar. 26, 1985), slip. op. 10-12.

[11] *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

d. Normally, a threshold determination that the Commerce Clause applies to a challenged legislative measure would suggest a need for further detailed inquiry into the degree of burden created and the legislative purposes served. *South-Central Timber Development, Inc.* v. *Wunnicke*, No. 82-1608 (May 22, 1984), slip op. 10. Further consideration of petitioners' Commerce Clause claim, however, is not warranted.

The gravamen of petitioners' complaint is that the government of Guam is favoring certain domestic business enterprises over other domestic enterprises. Their concerns are not directed to discriminatory practices that favor in-state interests to the detriment of out-of-state interests — the central concern of the Commerce Clause. See, *e.g.*, *Bacchus Imports, Ltd.* v. *Dias*, No. 82-1565 (June 29, 1984), slip op. 4 (citations omitted) ("A cardinal rule of Commerce Clause jurisprudence is that * * * [a] State [may not] * * * provid[e] a direct commercial advantage to local business."). Nor does this case trigger the Commerce Clause concern with "[u]nrepresented interests * * * bear[ing] the brunt of regulations imposed by one State" (*South-Central Timber Development, Inc.* v. *Wunnicke*, slip op. 9); petitioners are businesses operating within Guam and, consequently, are provided with "a powerful safeguard against legislative abuse" (*Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981)).

Indeed, the gist of petitioners' complaint is that the government of Guam has placed petitioners at a competitive disadvantage in order to raise revenues to construct an airport.[12] Interstate and foreign commerce may be incidentally affected by the arrangement, but we believe petitioners must find their relief, if any, in antitrust laws and not attempt to use "the Commerce Clause [to] inject[] principles of antitrust law * * *" (cf. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. at 619 n.8).[13] The merits of petitioners' suit, therefore, depends on their antitrust claim, to which we now turn.

3. We agree with respondents, and the court of appeals below, that the government of Guam and its instrumentalities are immune from suit under federal antitrust laws.[14] The proposition is widely accepted that federal instrumentalities are immune from federal antitrust attack. See, *e.g.*, *Jet Courier Services, Inc.* v. *Federal Reserve Bank*, 713 F.2d 1221, 1228 (6th Cir. 1983); *Feldman* v. *Gardner*, 661 F.2d 1295, 1307-1308 (D.C.Cir. 1981), cert. denied, 458 U.S. 1106 (1982), vacated on other grounds, 460 U.S. 462 (1983); *Sea-Land Service, Inc.* v. *Alaska R.R.*, 659 F.2d 243, 246 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982); *Webster County Coal Corp.* v. *TVA*, 476 F. Supp. 529, 532 (W.D. Ky. 1979); see also *United States* v. *Cooper Corp.*, 312 U.S. 600, 606 (1941) (dictum). And the government of Guam, as noted at the outset (page 4, *supra*), is in certain

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[12] Hence, the rationale of this Court's decisions immunizing activities of a state as a "market participant" from Commerce Clause challenge further undercuts petitioners' claim. See, *e.g.*, *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976).

[13] Indeed, petitioners' constitutional complaint is more suggestive of a substantive due process or equal protection claim, but those constitutional provisions have not been invoked.

[14] There is, of course, no question that the antitrust laws apply generally to Guam (*United States* v. *Standard Oil Co.*, 404 U.S. 558 (1972) (per curiam) (Sherman Act applies to American Samoa); *Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937) (Puerto Rico), the only issue here is their applicability to the government of Guam.

contexts best viewed as a federal instrumentality. The question whether a particular federal instrumentality is acting in a manner that thwarts congressional intent—including whatever intention Congress might have regarding the need to promote a fully competitive free market—is best resolved by reference to the relevant organic statutes and the policies they reflect, not through a suit brought under the antitrust laws. See *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 78-79 (1944).

To be sure, the government of Guam is an entity quite distinct from classic federal instrumentalities such as a Federal Reserve bank or the TVA and cannot for all purposes be viewed as a mere "creation of Congress" (*United States* v. *Wheeler*, 435 U.S. at 321). For the purposes of petitioners' antitrust claim, however, the special attributes of the government of Guam merely suggest an analogy to state action, rather than to private conduct to which antitrust restraints primarily apply. Congress surely intended the government of Guam, like the government of Puerto Rico, to possess "an autonomy similar to that of the states * * *" in the antitrust context. *Puerto Rico* v. *Shell Co.*, 302 U.S. at 262. The activities of Guam, challenged by petitioners, are not unlike the anti-competitive activities undertaken by states acting as sovereigns and certainly do not fall outside congressional contemplation.[15] Although the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341, 350-352 (1943), is not directly applicable to Guam, the rationale of that doctrine does support the appropriateness of affording Guam immunity akin to that of a federal instrumentality in the antitrust context.[16]

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[15] Indeed, Congress expressly conferred on the Guam legislature the power to impose "royalties for franchises, privileges, and concessions * * *" (48 U.S.C. 1423a). The Guam airport has received federal financial assistance and, consequently, the exclusive concession agreement may be subject to certain statutory requirements and relevant Department of Transportation regulations. See, *e.g.*, Airport and Airway Improvement Act of 1982, 49 U.S.C. App. 2210(a)(1); 49 C.F.R. 23.43(d)(1). No issue has been raised in this case, however, concerning the consistency of the concession agreement with these regulations, should they be applicable.

4. In sum, the court of appeals erroneously held that the dormant Commerce Clause does not apply to Guam, but petitioners' Commerce Clause claim is too insubstantial on the merits to warrant this Court's review. The court of appeals correctly ruled that the federal antitrust laws do not apply to the activities of the government of Guam challenged in this case.[17]

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[16] Petitioners misapprehend (Pet. 11-12) the import of this Court's suggestion in *United States* v. *Wheeler*, 435 U.S. at 321 n.16, that the relationship between a territory and the federal government could be compared to that between a city and a state. Limitations on the application of state antitrust immunity to municipalities (*e.g.*, *Town of Hallie* v. *City of Eau Claire*, No. 82-1832 (Mar. 27, 1985), slip op. 3-5) do not readily transfer to federal instrumentalities; different considerations are relevant in the federal context, especially, where, as here, Congress clearly intended the government of Guam to act much like an autonomous sovereign.

[17] Because the petition for a writ of certiorari presents no question concerning the antitrust liability of a private party such as respondent Duty Free, we do not discuss that subject.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 85-552

IN THE

Supreme Court [illegible] the United States

OCTOBER TERM, 1985

◆

YOSH SAKAMOTO, PACIFIC GIFT SUPPLY, INC.,
and TOP ENTERPRISES, INC.,
Petitioners,

—against—

DUTY FREE SHOPPERS, LTD., GUAM AIRPORT AUTHORITY,
AND THE GOVERNMENT OF THE UNINCORPORATED
TERRITORY OF GUAM,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-552

YOSH SAKAMOTO, PACIFIC GIFT SUPPLY, INC.,
and TOP ENTERPRISES, INC.,

Petitioners,

—against—

DUTY FREE SHOPPERS, LTD., GUAM AIRPORT AUTHORITY,
AND THE GOVERNMENT OF THE UNINCORPORATED
TERRITORY OF GUAM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

INTRODUCTION

The Solicitor General agrees with the Government of the Unincorporated Territory of Guam, the Guam Airport Authority, and Duty Free Shoppers, Ltd. ("respondents") that the federal antitrust laws do not apply to the government of Guam, and that the challenged conduct does not constitute an undue burden on interstate or foreign commerce. These grounds warrant denial of the petition for a writ of certiorari, and the Solicitor General concludes that "[t]he petition for a writ of certiorari should be denied." Brief at 13. These are not, however, the only reasons for denying the petition.

Although he did not need to address the issue in light of his ultimate conclusion, the Solicitor General also asserts that he finds evidence of Congressional intent to apply the negative implications of the Commerce Clause to the government of Guam in language "not yet focused on by the parties or considered by the courts below." Brief at 7. He refers to the provision in the Guam Organic Act which provides that the power of the Guam Legislature shall extend to all subjects of "local application," 48 U.S.C. § 1423a, and argues that, "during the general time period that Congress drafted [the Organic Act]," the word "local" suggested an intent to impose the dormant Commerce Clause. Brief at 7.

Respondents respectfully disagree with this portion of the Solicitor General's brief, and submit this brief to set forth some of the reasons for their disagreement. The authorities cited by the Solicitor General accord no such meaning to the word "local," and other circumstances confirm the error of that argument. Respondents contend that the inapplicability of the dormant Commerce Clause to the government of Guam provides additional cause for the petition to be denied.

1. The Solicitor General recognizes "Congress' express intent not to apply the Constitution generally" to Guam. Brief at 7. Rather, the Guam Organic Act, 48 U.S.C. §§ 1421-1428, imposes a variety of Constitutional limitations on the government of Guam by specific enumeration. 48 U.S.C. § 1421b (printed in Appendix B of the principal brief of the Guam Airport Authority and Duty Free Shoppers, Ltd.) sets forth this list, using language that unequivocally expresses Congressional intent. For example, it provides that

> (a) No law shall be enacted in Guam respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the

> press, or the right of the people peaceably to assemble and to petition the government for a redress of their grievances.
>
> . . . .
>
> (d) No person shall be subject for the same offense to be twice put in jeopardy of punishment; nor shall he be compelled in any criminal case to be a witness against himself.
>
> (e) No person shall be deprived of life, liberty, or property without due process of law.
>
> (f) Private property shall not be taken for public use without just compensation.
>
> (g) In all criminal prosecutions the accused shall have the right to a speedy and public trial. . . .
>
> . . . .
>
> (n) No discrimination shall be made in Guam against any person on account of race, language, or religion, nor shall the equal protection of the laws be denied.
>
> . . . .

A 1968 amendment to the Guam Organic Act imposed additional Constitutional limitations on the government of Guam, again in unmistakable language:

> (u) The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

48 U.S.C. § 1421b(u).

In light of this lengthy and express enunciation of Constitutional limitations, it is not appropriate to infer that Congress intended to incorporate the negative implications of the Commerce Clause in a different section of the statute by use of a code word, rather than through the clear language it used in applying many other provisions.

This view is supported by the case law in effect at the time of the enactment of the Organic Act. By 1950, it was well settled that certain provisions of the Constitution, *viz.*, "the general prohibitions . . . in favor of the liberty and property of the citizen," applied to the government of a territory by their own force. *See Downes* v. *Bidwell*, 182 U.S. 244, 339 (1901) (concurring opinion). But, the First Circuit had held that the Commerce Clause has no such effect. *Buscaglia* v. *Ballester*, 162 F.2d 805 (1st Cir.), *cert. denied*, 332 U.S. 816 (1947). Under these circumstances, if Congress had intended in 1950 to apply the Commerce Clause to the government of Guam, it surely would have articulated that intent in a manner at least as clear and straightforward as it did with regard to, for example, the rights of due process (48 U.S.C. § 1421b(e)) and just compensation (48 U.S.C. § 1421b(f)).

Moreover, in 1962 the District Court of Guam refused to apply the negative implications of the Commerce Clause to the government of Guam, even though the "local application" language of the Organic Act had been in effect since 1950. *Ambros, Inc.* v. *Maddox*, 203 F. Supp. 934, 937 (D. Guam 1962). When it enacted § 1421b(u) in 1968, Congress had an easy opportunity to overrule *Ambros*, if it believed that decision to be contrary to the intent of the "local application" language. Congress did not include Article I, § 8, cl. 3 in the Guam Organic Act at that time. Nor has it done so since, despite a number of subsequent amendments to the Organic Act. *E.g.*, Economic Development of Territories Act, Pub. L. No. 98-454, Title VIII, 98 Stat. 1741 (1984); Guam Tax Laws Act, Pub. L. 92-606, 86 Stat. 1494 (1972).

2. The Solicitor General contends that, during the general time period the Organic Act was drafted, the word "local" was a "term of art" that suggested application of the negative implications of the Commerce Clause. However, at that time, in a virtually identical context, the United States Government recognized no such significance in that word.

Buscaglia v. *Ballester*, 162 F.2d 805 (1st Cir.), *cert. denied*, 332 U.S. 816 (1947), involved the question whether the negative implications of the Commerce Clause applied to the then Territory of Puerto Rico. Section 37 of the Puerto Rico Organic Act contained a provision substantively identical to the "local application" language of the Guam Organic Act. *See* 48 U.S.C. § 821 (repealed) (set forth as Appendix A hereto) (legislative authority of the territory applied to "all matters . . . not locally inapplicable").

The brief for the Treasurer of Puerto Rico in the First Circuit in *Buscaglia* was filed in April 1947 by attorneys of the United States Departments of Justice and the Interior. That brief specifically rejected (as did the First Circuit) the argument that Congress had applied the negative implications of the Commerce Clause to that territorial government:

> [A]s the court below correctly held, the Commerce Clause . . . does not apply to Puerto Rico and does not restrict the power of the insular legislature. . . . Again, Congress has not chosen to impose upon the insular legislature the restrictions of the Commerce Clause. . . .

Brief for the Appellant in *Buscaglia* (an excerpt of which is set forth as Appendix B hereto), at 12-13.

3. Congress did not in the Organic Act apply the negative implications of the Commerce Clause to Guam. As the Solicitor General agrees (Brief at 6), absent such Congressional application, that constitutional provision does not limit the government of Guam.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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